Supreme Court, U.S.
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In The Supreme Court of the United States

EUGENE WILKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court erred in ruling that Wilkins was properly advised of his rights as required by *Miranda v. Arizona*?

2. Whether the trial court erred in ruling that there had been probable cause to justify the issuance of a search warrant for the 3943 Bridge Road property?

3. Whether the trial court erred in ruling that the search of the El Camino was proper?

4. Whether the evidence seized pursuant to the warrantless search of the El Camino was nonetheless admissible?

LISTINGS OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

The parties to the proceeding in the Virginia Supreme Court are the same as the parties who appear in the caption of this case.

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PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice and The Associate Justices Of The Supreme Court.

Eugene Wilkins, by counsel, petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia in this case

OPINIONS BELOW

Opinion, Supreme Court of Virginia (September 13, 2002) (Upon a Petition for Rehearing) (App. 1)

Opinion, Supreme Court of Virginia (July 24, 2002) (Upon a Petition for Appeal) (App. 2)

Opinion, Court of Appeals of Virginia (April 8, 2002) (Upon a Petition for Rehearing En Banc) (App. 3)

Opinion, Court of Appeals of Virginia (February 12, 2002) (Denying Appeal) (App. 4)

Opinion, Court of Appeals of Virginia (June 6, 2001) (Granting Appeal) (App. 21)

Opinion And Order, D. Arthur Kelsey, Judge (August 10, 2000) (denying motion to suppress) (App. 26)

JURISDICTION

The opinion of the Supreme Court of Virginia was entered on September 13, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Fourth, Fifth, and Sixth Amendments of the United States Constitution.

STATEMENT OF THE CASE

Eugene Wilkins was charged with two counts of possession of cocaine with intent to distribute in violation of Va. Code Ann. §§ 18.2-248 and 18.2-248.1. By Order of the Circuit Court of the City of Suffolk, Virginia, the Honorable D. Arthur Kelsey, Judge, presiding, entered on the 6th day of December, 2000 found the Appellant guilty of violations of Virginia Code §18.2-248 and 18.2-248.1 to-wit, possession with intent to distribute cocaine and possession of cocaine. (App. 23).

On July 10, 2000, A *Motion To Suppress* was heard by the Honorable D. Arthur Kelsey. After hearing evidence and argument by counsel, the trial court directed the parties to brief their arguments and upon receipt of the briefs the trial court would decide the motion and later issue a written opinion. (JA 107-108).[1] Thereafter, after having received the parties' briefs, the trial court denied the *Motion To Suppress* and later incorporated its holding into a written opinion of the case. (App. 26).

On August 9, 2000, Wilkins appeared before the trial court and was arraigned and pled not guilty.

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[1]"JA" refers to the Joint Appendix filed in the Virginia Court of Appeals.

The Defendant chose to have the trial conducted before a judge.

At trial, by agreement of the parties, the Commonwealth presented evidence by way of stipulation. (JA 114). In response to inquiries by the trial court, Wilkins advised the trial court that he intended to plead not guilty based upon a stipulation of facts agreed to by the parties. (JA 112). Further, Wilkins and the Commonwealth advised the trial court, it was understood by the parties that although Wilkins was pleading not guilty, he was doing so with the intention of appealing the trial court's decisions in denying Wilkins' suppression motion, and that the suppression hearing transcript would be incorporated into the record. With this information, the trial court accepted Wilkins' not guilty plea and tried and found him guilty. (JA 122).

On December 6, 2000, Wilkins appeared before the Honorable D. Arthur Kelsey and, after taking evidence and hearing the arguments of the parties the trial court sentenced Wilkins to "eight years and three months in the Virginia State Penitentiary on the first conviction and suspending two years of that for an effective incarceration of six years and three months. "I order the exact same sentence for the second charge . . .and for the two to run concurrent." The trial court also placed Wilkins on supervised probation for five years. (App. 24).

At the suppression hearing of July 10, 2000, the Commonwealth presented the following evidence which was presented to the Magistrate which led to the issuance of the search warrants in question.

The informant, CI1, purchased cocaine from the home of Calvin West on February 25, 1999, after the defendant had allegedly dropped off the product at West's home just prior to

the purchase. *Id.* From conversations between West and CI1, the police learned that the defendant supplied the cocaine in marketable quantities to West. Purchasers from West would know that a delivery by the defendant had taken place by looking at West's porch light: if the light was on, business was off; if the light was off, business was on. (JA 12-14).

Almost six months later, on June 16, 1999, the police conducted a similar controlled purchase from West's home. (JA 15-21). As before, the defendant drove to West's home (while the porch light was on) and dropped off the cocaine for resale (after which the light was turned off). The defendant carried a "white bag" as he left his own home and brought it with him when he entered West's home. (JA 130) (search warrant affidavits). On this occasion, a different confidential informant, CI2, went into West's home and met with the defendant. *Id.* The defendant allegedly pulled a "large piece of crack cocaine" from the white bag and sold it to CI2. *Id.*

At that point the police had placed surveillance on Wilkins and on June 17, 1999, Wilkins was observed making similar stops. On that day, however, Wilkins was observed by the police to have stopped by an intermediate location (a house on Bridge Road in Suffolk where, the police knew, Wilkins' mother lived). During their surveillance at the Bridge Road location, police officers saw the defendant stop at the house and walk "to the side of the house or towards the side of the garage area." (JA 20). The officers briefly lost visual contact with the defendant because of a "big tree on the side of the house." (JA 26). An El Camino vehicle (later discovered to be owned by the Wilkins) was observed once in the driveway of the Bridge property.[2] The police then made another controlled purchase

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[2]In the trial court's written opinion the court states that Wilkins' El

directly from the defendant. (JA 130) (search warrant affidavits).

Based upon the information then in hand, the police secured search warrants for West's home (6117 Brookwood Drive, Suffolk), the defendant's home (100 Waterview Road, Suffolk), and the defendant personally. *Id.* The next day, June 18, the police decided to conduct a fourth controlled purchase before arresting the defendant. Wilkins was observed driving his van to the Bridge property, getting out of his car and going to the side of the house before driving back to his home and then, finally, to West's residence on Brookwood Drive. (JA 23); (JA 130) (search warrant affidavits). Wilkins was stopped by the police less than a block or two from West's house and arrested for distributing drugs. (JA 41-42).

After Wilkins' arrest, the police drove him back to his own home. At the defendant's home Detective DeFreitas asked the defendant "if he had been Mirandized," and he said that "he didn't know." (JA 54). The detective testified that he then "Mirandized" the defendant. *Id.* The detective then asked the defendant "if he wished to talk to [him] without an attorney present." (JA 54). The defendant said "yes, he would talk" to the detective. *Id.* DeFreitas and the defendant had a "continuous" conversation until about noon when the defendant announced that "he wanted to speak to a lawyer." (JA 55). The

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Camino was observed "*parked right behind the big tree" on the side of the house.* (JA 26). But the page cited is a transcription of testimony dealing with the location of the El Camino at the time the search was executed, *not* during the period of surveillance. A review of the surveillance period reveals that the El Camino was observed only one time in the driveway of Wilkins' mother's house. (JA 130). Nonetheless, the trial court repeatedly makes this mistake in its opinion.

detective promptly suspended any further interrogation. "I told him I couldn't talk to him any more," the detective explained. *Id.*

At about 2:30 p.m., the defendant told the detective that he had "changed his mind" and now "wanted to talk." *Id.* He then said that he would take Detective DeFreitas "to where the drugs were." *Id.*. The defendant then told Detective DeFreitas that the drugs could be found in his vehicle (the El Camino) at the Bridge property. (JA 58). Wilkins and DeFreitas then drove to the Bridge property where Wilkins walked with DeFreitas over to the El Camino and said, "it is in the back seat." (JA 59). Detective DeFreitas looked, but found nothing.

Though DeFreitas did not know it at the time, just a "few minutes" before his arrival another police officer, Detective Wright (Wright) had searched the El Camino and found cocaine and digital scales, pursuant to a search warrant. (JA 59, 69). Wright conducted the search after receiving a radio call from another officer, Detective Chappell, stating that he had just obtained a search warrant for the Bridge Road location. (JA 68). Both Wright and Chappell were unaware that the defendant had confessed to DeFreitas and agreed to the search of the El Camino. (JA 70, 44-45, 50). The search by Wright was "purely based" on Chappell's newly issued warrant. *Id.*

Detective Chappell, a seventeen-year veteran of the force, had decided to secure the search warrant for the Bridge property not long after Wilkins' arrest that morning. (JA 25). He had prepared the original affidavits in this case (as well as over 300 or more during his career), and he drafted the affidavit for the Bridge property. (JA 44). Chappell's affidavit for the warrant was an almost verbatim copy of the previously submitted affidavits in support of the other searches. The only references to the Bridge property in the affidavit supporting the

request for a search warrant for the Bridge property were that on June 17, Wilkins "was observed going towards the side door" of the Bridge property. (JA 130) (search warrant affidavit for Bridge Road) and that on June18, Wilkins "went up to the side of the house." *Id.* The affidavit then went on to state that Wilkins, later went to West's home to drop off the cocaine. *Id.* The search warrant affidavit recited that an El Camino, owned by Wilkins, was "parked in the driveway" of the Bridge Road residence. *Id.*

The magistrate accepted the affidavit's proffer of probable cause and issued the search warrant for the Bridge Road home "with a carport" and any "out buildings and curtilage." (JA 130) (search warrant for Bridge Road location). The magistrate issued the warrant at 1:30 p.m., about an hour before the defendant's confession. Cf. *Id.* (JA 56.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I THE TRIAL COURT ERRED IN RULING THAT WILKINS WAS PROPERLY ADVISED OF HIS RIGHTS AS REQUIRED BY *MIRANDA V. ARIZONA*)

Possibly no other aspect of the law is considered as recognized as the "Miranda rights" warning which must be given to all suspects in custody prior to taking any admissible statement from the suspect. The principle announced in *Miranda v. Arizona*, 384 U.S. 436, 469-73, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966); see also *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000) (reaffirming the continued viability of *Miranda*), as Judge Kelsey observed in his opinion, ". . . has become so much a part of our national culture that courts routinely refer to the act of a police officer providing the *Miranda* warnings as having "Mirandized" a suspect." (App. 34). In addition, the Commonwealth bears the burden of proving the defendant voluntarily ignored the *Miranda* warnings and made a knowing and intelligent waiver of his constitutional privilege against self-incrimination and his right to counsel. *Shell v. Commonwealth*, 11 Va. App. 247 (1990).

Although through usage in the vernacular the word "mirandize" has established itself as meaning "to recite the Miranda warnings to (a person under arrest)," Merriam-Webster's Dictionary of Law ©1996, the term, by itself and in and of itself does not carry the Commonwealth's burden of proving that Wilkins was told the same warnings *Miranda*

requires of it. As is noted herein, the government may meet the *Miranda* requirements in many different ways, so long as the substance of the warnings described in *Miranda* is transmitted to the suspect and understood by him or her. It is impossible to determine from the trial record whether this was done and how it was done with Wilkins.

To illustrate the problem created by the Commonwealth's choice of not placing in the trial record how and which warnings were given the suspect, one need only consider in reviewing this appeal what was it that Wright told Wilkins when he "mirandized" Wilkins? Saying that Wilkins was "mirandized" does not tell the trial court and does not establish a record of what warnings were given. If using the term "mirandized" now obviates the need to state what warnings were given a suspect, how would one know if the officers are forgetting to give the Miranda warning about having an attorney appointed? Did Wright tell Wilkins that he could have an attorney appointed to represent him if Wilkins qualified as indigent? Did Wright tell Wilkins he could have an attorney but didn't mention the fact that one could be appointed? Did Wright forget that he forgot to give one of the required warnings? Would Wilkins have spoken to Wright had he known that he could have had a defense attorney and consulted with him before he spoke to the police even though he thought he couldn't afford one? Or did Wright tell Wilkins something to the effect of "you can have a lawyer any time you want, but then I can't help you?" The defense is not suggesting that Wright said one thing or the other. That is not the issue. The issue is does the trial record reflect what Wright told Wilkins when he "mirandized" Wilkins? Since it does not, how can the Commonwealth have shown by a preponderance of the evidence that the appropriate warnings were given?

In the written opinion from which this appeal was taken,

Judge Kelsey beautifully synopsized the rights and procedures flowing from *Miranda* and which one would guess the term "mirandized" connotes:

> The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. A suspect subject to custodial interrogation "has the right to consult with an attorney and to have counsel present during questioning," and that the police must "explain this right" to the accused before questioning begins. *Shackleford v. Commonwealth*, 32 Va. App. 307, 322, 528 S.E.2d 123, 131 (2000) (quoting *Davis v. United States*, 512 U.S. 452, 457, 129 L. Ed. 2d 362, 114 S. Ct. 2350 (1994)).
>
> Once advised of his *Miranda* rights, a suspect may make a knowing and intelligent waiver of those rights and respond to the police interrogation. See *North Carolina v. Butler*, 441 U.S. 369, 373-75, 60 L. Ed. 2d 286, 99 S. Ct. 1755 (1979); *Shackleford*, 32 Va. App. at 322, 528 S.E.2d at 131. The Commonwealth must prove by a preponderance of the evidence that the waiver was made voluntarily, knowingly, and intelligently. *Shackleford*, 32 Va. App. at 322-23, 528 S.E.2d at 131 (citing *Goodwin v. Commonwealth*, 3 Va. App. 249, 252, 349 S.E.2d 161, 163 (1986)). (App.).

How else could it have ruled that the statement "I mirandized him" in and of itself is sufficient to carry the Commonwealth's burden of proof that the defendant knowingly and intelligently waived the rights defined in *Miranda*? "I

mirandized him" does not constitute a sufficient *Miranda* warning and putting this Court's imprimatur upon such a practice would be to go against every principle that the warnings were intended to uphold.

The failure to place in the trial record evidence of the substance of the Miranda warnings being explained to Wilkins demands suppression when considered in the light of the facts of this case. When Detective Defreitas "mirandized" Mr. Wilkins, he knew that Mr. Wilkins was not sure if he had previously received Miranda warnings or not. Therefore, before questioning Mr. Wilkins, Detective Defreitas was required to properly give warnings to Mr. Wilkins in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966). Not only did the law require this of him, it expected it of him. Instead, all that was stated by the Detective at trial was that he "mirandized him." Worse, it was done verbally, not in writing, and it was done from his memory. It is unclear from the testimony of Detective Defreitas what, if any, rights were explained to Mr. Wilkins or if Mr. Wilkins understood them. The trial record has no other reference to the issue.

While no "talismanic incantation" of the *Miranda* warning is necessary, *California v. Prysock*, 453 U.S. 355 (1981), it is recognized that there is a "critical importance of the right to know that counsel may be present during questioning." *United States v. Noti*, 731 F2d 610 (9th Cir. 1984) In *United States v. Bland*, 908 F2d 471 (9th Cir. 1990), *Bland* was told that he had a right to an attorney prior to questioning, and if he could not afford one, that an attorney would be appointed for him. The warning, however, failed to mention that *Bland* was entitled to have an attorney during questioning. *Bland's* statements were held to be inadmissable because the warning given was inadequate. If failing to explain to the defendant that he or she had a right to an attorney being present

while he was being questioned when telling the defendant that he or she has a right to an attorney violates *Miranda*, then not knowing what the substance of the warnings given the defendant was would seem to be just as fatal an error by the Commonwealth.

We agree with the premise in *United States v. Frankson*, 83 F3d 79 (4th Cir. 1996) in that all police officers need to do is "convey the general rights enumerated in *Miranda*." In *Frankson*, there was testimony that the rights he received were as follows:

> Now I want to advise you of your rights. First of all, you have the right to remain silent. Anything you say, do, or write can and will be used against you. You have the right to an attorney. If you can't afford an attorney, the Government will get one for you. I also explained to him he could answer some of my questions, all of my questions, or none of my questions. I also told him that while he was talking to me, he was free to stop talking to me at any time. I asked him if he understood that. He indicated that he did by answering yes."

This reading was held to be sufficient in alerting *Frankson* of his *Miranda* rights.

Once again, the facts of Wilkins' case are different. There is no testimony in the present case that this *Miranda* warning or any other warning mandated by *Miranda* was mentioned. As Wilkins told Wright that he didn't know if he had been given his *Miranda* warnings, one must naturally wonder what he was told by Wright and whether he ever understood what he was told. For instance, if Wilkins could not

recognize the warnings when they were first given to him, how would one know that the difference not explained in *Bland* was made clear to Wilkins? The rule in all direct appeals is that the court must look to the trial record and base its rulings on those facts, not facts that are not to be found in the trial record. If the *Miranda* warnings are to be treated in the same way as all other aspects of the law, the record requires that this Court find that they were not properly given and suppress all evidence derived therefrom.

Clearly the Commonwealth did not overcome its burden of showing that Mr. Wilkins waived any rights, since no rights - as far as can be ascertained from the trial record - were revealed to Wilkins by the detective. Therefore, any and all statements given to the police and any evidence recovered that was discovered through statements from Mr. Wilkins, must be suppressed due to the failure of his receiving sufficient *Miranda* warnings. To not do so would be to encourage further flouting of the rights defined by Miranda.

II THE TRIAL COURT ERRED IN RULING THAT THERE HAD BEEN PROBABLE CAUSE TO JUSTIFY THE ISSUANCE OF A SEARCH WARRANT FOR THE 3943 BRIDGE ROAD PROPERTY.

Detective Chappell obtained a search warrant for 3943 Bridge Road ("Bridge property") from the Magistrate on June 18, 1999. The search warrant request was supported by an affidavit which was almost an exact copy of search warrants Chappell had submitted in support of searches of two other residences. Except that on the sixth page of the affidavit Chappell states that Wilkins stopped at the Bridge property en route to the drug sale. The affidavit also states that the Bridge property is occupied by Wilkins' 89 year old mother. (JA 130).

In order to have a search warrant issued in this case Detective Chappell had to go to the Magistrate and provide him with the information that had convinced Detective Chappell that Wilkins was engaged in criminal activity. Once Chappell had supplied the Magistrate with that information, then Chappell had to also provide information that caused him to believe that the searches he wished to conduct were likely to lead to evidence of criminal activity. These hurdles have been put in place to guard against the government conducting searches at its whim. The power to search is the power to invade and the courts must be ever vigilant against government excesses in this area.

The Fourth Amendment of the United States Constitution provides that "a search warrant shall issue only upon a showing of probable cause supported by oath or affirmation." Because the unwarranted and unannounced search of a person's home and possessions by the British was used as a tool of terror against the American colonists, the protection from such government abuse has been jealously protected ever since we separated from Britain. The drafters of the Constitution were careful and intentionally specifically limited the government's power to invade a citizen's home. Modern times do not mean that the protections should dim because the government thinks it expedient. That was, after all, the British justification for the unannounced searches of the colonists' homes.

The Supreme Court of the United States has repeatedly reminded us that a warrantless search is a *per se* violation of the Constitution. Only where the government provides a statement under oath alleging facts sufficient to establish probable cause to believe that the area or things asked to be searched are evidence of criminal activity can a search warrant be issued.

The phrase "probable cause" is a term of art used in many contexts of criminal law but always with the same meaning:

> *Probable cause* exists **when the facts and circumstances within the arresting officer's knowledge and of which he has reasonable trustworthy information** are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense had been or is being committed. *Derr v. Commonwealth*, 242 Va. 413, 421, 410 S.E.2d 662, ___ (1991).

It is a *belief*, reached after reviewing facts, that a crime is being or going to be committed. If one believes that a crime is being committed and that belief is one most reasonable and prudent people would reach, then "probable cause" exists.

We must look to the totality of the circumstances alleged in the affidavit in support of the search warrant to decide whether the it presents sufficient information to establish probable cause. *Illinois v. Gates*, 462 U.S. 213, 230 -31 (1983). Because it is fact specific, no formulaic approach lends itself to determining whether probable cause exists or not. The Supreme Court, recognizing the dilemma, has explained the correct process those responsible for issuing the warrant should follow:

> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the `veracity ' and `basis of knowledge ' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a

> reviewing court is simply to ensure that the magistrate had a `substantial basis for . . . [concluding] ' that probable cause existed. 462 U.S. at 238-39, (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)) (ellipses in original).

At the same time, the Court warns, this is not an opportunity to second guess the magistrate's decisions. The totality of the circumstances analysis does not mean an after-the-fact review of a magistrate's decision should not be made *de novo* and but that great deference should nonetheless be given to the magistrate's finding of probable cause. *Gates*, 462 U.S. at 236.

The basis and sufficiency of affidavits submitted in support of a request for the issuance of a search warrant has been explored by both the Federal and Virginia courts many times but there has yet to be a case decided which involves the propriety of searching a non-occupant's car found at the object of a search warrant.

Code of Virginia Section 18.2-54

The Virginia Code, § 18.2-54, provides a statutory basis for the affidavit in support of search warrant requirement. In keeping with the principles detailed earlier, 18.2-54 details what is necessary to have a search warrant issued. The Commonwealth's mandate is both specific and restrictive and its consequences severe:

> **No such warrant shall be issued on an affidavit omitting such essentials,** and no general warrant for the search of a house, place, compartment, vehicle or baggage shall be issued. (Emphasis added).

18.2-54 tells us that in order to strip away the Fourth Amendment protections, the Commonwealth must tell the Magistrate WHERE it wants to search, WHAT it wants to search for and WHY it wants to search there for it:

> No search warrant shall be issued until there is filed . . . an affidavit . . . reasonably describing the **place, thing, or person** to be searched, the **things or persons to be searched** for thereunder, alleging briefly material facts, constituting the probable cause for the issuance of such warrant and alleging substantially the offense in relation to which such search is to be made and **that the object, thing, or person searched for constitutes evidence** of the commission of such offense.

(Emphasis added).

For the search of the Bridge property to have been legal, the affidavit submitted in support of the issuance of the search warrant had to meet 18.2-54's requirements.[3] Yet the only time the Bridge property is mentioned in the eight (8) page affidavit supporting the search warrant request is on page six (6), where it is stated:

> Wilkins stopped at 3943 Bridge Rd. exited the van and was observed going towards the side door.

This statement is insufficient to cause one to believe that a crime

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[3]To the extent Wilkins invokes constitutional guarantees arising under Article I, §§ 10 of the Virginia Constitution, the state law analysis tracks the federal law interpreting the Fourth Amendment of the U.S. Constitution. See *Henry v. Commonwealth*, 32 Va. App. 547, 551, 529 S.E.2d 796, 798

is being committed or about to be committed involving the Bridge property. As it did not allege how the Bridge property was involved in the charges, nor any material facts relating the alleged crimes to the property, and the record is devoid of any further evidence of something more showing the criminality to exist, the search warrant's issuance was in violation of 18.2-54.

Evidence Before Magistrate

Detective Chappell never provided the Magistrate with any information that could have been the basis upon which the Magistrate could have determined that there was probable cause to believe that a crime or evidence of a crime could be found via a search of the Bridge property. A review of the affidavits prepared by Chappell reveals that the Bridge property was mentioned one single time in the affidavit pertaining to the search warrant for that property and that was not in relation to any fact material to the crimes alleged. The search warrants each very precisely state what is to be searched - what areas protected by the Constitution are to be trespassed upon because there has been sufficient evidence of possible crime presented.

Instead, the Commonwealth now argues that the El Camino did not have to be listed as something to search because it was within the curtilage of the property that the Search Warrant included. This position fails because there is no legal basis for it. A review of the case law on the subject reveals no Virginia cases on the point. But, the Fourth Amendment's right against unwarranted searches still stands and commands compliance.

If the Commonwealth had wanted to search a vehicle whose owner they had identified, whose license plate numbers they had and whose location they knew was in the driveway of a property which the owner did not live at, a search warrant

should have been obtained. The facts of the search of the El Camino are the very type of circumstances the drafters of the Fourth Amendment intended to address. Because, on the face of it, this is a search based upon a warrant where the Magistrate was not told of the existence of the El Camino and, thus, only the government - not a neutral, detached judicial authority - decided whether the El Camino could be searched or not. It is entirely possible that had the Commonwealth actually asked that the El Camino be searched that the Magistrate, with more facts than those contained in the affidavit, would have included it in the warrant. But he was not given that chance and Wilkins' Constitutional protections were victimized.

Good Faith Exception

Although there is a good faith exception to the exclusionary rule, it does not apply to Mr. Wilkins' case. In *United States v. Leon*, 468 U.S. 897 (1984), the court held that the police could rely on a defective warrant in some situations. However, (1) if the judge or magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth, or if the magistrate was not wholly detached and neutral, or (2) if the police rely on a warrant lacking "in indicia" of probable cause as to render official belief in its existence entirely unreasonable, or (3) if the warrant is so facially deficient that the police cannot reasonably presume it to be valid, then the good faith exception does not apply. *See Leon* and *Robinson v. Commonwealth*, 19 Va. App. 642, 647 (1995).

There is an argument to be made whether or not the magistrate in the present case was "wholly detached and neutral" considering the amount of information given to him regarding the Bridge Road address ((1) above). We can also argue that there was no way the police could have reasonably

presumed it valid ((3) above). However, it is clear that there was no "indicia" of probable cause in the affidavit to render it reasonable and therefore the warrant was invalid and the good faith exception does not apply.

Expanding on what is "probable cause" we look to *United States v. Hove*, 848 F2d 137 (9th Cir. 1998). This case holds that facts set forth in an affidavit must establish a nexus between the place to be searched and the alleged criminal activity and that the *Leon* exception does not extend "to allow the consideration of facts known only to an officer and not presented to a magistrate. The *Leon* test for good faith reliance is clearly an objective one and it is based solely on facts presented to the magistrate." *Id.* at 140.

There is no nexus between criminal activity and the fact that one time Mr. Wilkins stopped by his mother's residence on Bridge Road. Therefore, the search warrant should be held to be void and the subsequent search of the El Camino to be against Mr. Wilkins' Fourth Amendment rights and in violation of §19.2-54 of the Code of Virginia.

III THE TRIAL COURT ERRED IN RULING THAT THE WARRANTLESS SEARCH OF THE EL CAMINO WAS PROPER.

Wilkins does not believe that there was probable cause to issue a search warrant for the Bridge property. If, however, this Court agrees with Judge Kelsey and finds that the Magistrate properly authorized the Commonwealth to search at the Bridge property, that authority did not extend to the El Camino that Officer Wright found at the Bridge property. The search warrant did not identify the El Camino nor did it refer in any way to any vehicle either to be searched or searched for. The reason no vehicle is identified in the search warrant is that

there were no facts alleged in the affidavit which connected the El Camino -or any vehicle - to criminal activity.

Based on the affidavit, the Magistrate crafted a search warrant that was very specific. It tracked all of the elements that 18.2-54 and the constitutions set out and granted the Commonwealth only just as much power to search as the facts alleged required. The result was a specific instruction explicitly telling the Commonwealth where it might search and for what:

> . . . a single story off white brick family dwelling with a *carport* on the *westend of the dwelling* located in the Bernehowe Manor section of the City of Suffolk, VA. Also to include *any out buildings and curtilage*.. . [for the following] the illegal substance cocaine. Any paraphernalia used in the distribution and/or use of cocaine, any monies or ledgers that would indicate previous drug transactions. Any electronic devices such as but not limited to scales, pagers, and answering machines used to facilitate drug transactions. Any personal papers that would indicate residency at [Bridge property]. (emphasis added).

Wilkins' El Camino was not listed in the search warrant as something to be searched or searched for because there was no allegation in the supporting affidavit that the El Camino was involved in criminal activity. The Magistrate simply applied the principles of 18.2-54 and the Fourth Amendment and issued a search warrant that did not include the El Camino.

The trial record amply reflects that Chappell and Wright were very experienced police officers, (JA 26-28), and therefore knew that if they wanted to search a vehicle, they should list it

in the affidavit as something they wished to search. Chappell had claimed to have drafted over 300 applications for search warrants and been involved in over 1000. *Id.* Accordingly, Chappell and Wright well knew through their years of police work, that the Affidavit For Search Warrant is a prepared form which the officer fills in, providing the appropriate information where needed.

The form for the affidavit, Form DC-3338, has a section which begins with the preprinted sentence "**The place, person, or thing to be searched is described as follows:**" The third section of the affidavit form begins with the preprinted phrase "**The things or persons to be searched for are described as follows:**" Clearly, had the police wished to search the El Camino, it should have been listed in either section of the form. Then, the Magistrate would have had the opportunity to review the supporting evidence and could have determined whether the vehicle should be searched. Instead, the El Camino was listed on a single occasion and simply described as "in the driveway" of the Bridge property. It was not identified as something to search or search for. Since the El Camino was not included in the terms of the warrant, the results relating to a search of it must be suppressed.

Independent Search By Wright

If the affidavit in support of the search warrant is deemed to have been insufficient and therefore the search warrant issued improvidently, then this case is one involving a *warrantless* search. Warrantless searches are *per se* violations of both the Commonwealth and Federal constitutions and clearly do not meet 18.2-54's requirements. Thus, if the search of the El Camino is to be legal, it must be so through Wright's search of the El Camino.

Wright's presence at the Bridge property was, one would have to assume, in anticipation of executing the search warrant Chappell was obtaining. Wright could not have been trying to preserve evidence from destruction or theft as he had been one of the officers to arrest Wilkins earlier in the day and therefore knew that Wilkins was not at large, (JA 70); also knew that Chappell was obtaining a search warrant for the Bridge property as he had spoken to Chappell and been told the warrant had been obtained and Chappell was bringing it to the Bridge property. *Id.* Both Wright and Chappell testified that neither had discussed the terms of the search warrant when Chappell told him that he was en route with the search warrant. (JA 68-70). Chappell had testified earlier that he had drafted the search warrant and there is no evidence that Wright was involved with this activity. (JA 26). With these facts, it is difficult, if not impossible, to see how Wright could have searched the El Camino without having a search warrant yet believing in good faith that he was doing so legally.

The trial court found that the search of the El Camino was constitutionally valid as the car was within the curtilage of the Bridge property. As Judge Kelsey discussed in his opinion, there is an extraordinary amount of case-law regarding automobiles found within the curtilage of dwellings that are searched. None, however, apply to this case. In *United States v. Bulgatz*, 693 F2d 728 (8th Cir. 1982), the court held that it was proper to search a parked car in an attached garage, even though it wasn't specifically stated in the search warrant. However, the car was inside the building and was owned by the occupants.

In *United States v. Napoli*, 530 F2d 1198 (5th Cir. 1976), a camper in the driveway was found to have been properly searched, but that was because the search warrant stated things "on the premises" were subject to the search.

Finally, in *United States v. Beall*, 767 F2d 913 (4th Cir. 1985), the court upheld the search of a truck parked in an auto body shop, when the warrant was just for the auto body shop. All of these searches were found to be reasonable and we agree. Assuming the warrants were based on probable cause, in each of those cases the warrants either specifically mentioned the area to be searched or they included curtilage that belonged to the properties being searched.

One case that is similar to the present case is *Glenn v. Commonwealth*, 10 Va. App. 150 (1990). Glenn's automobile was searched while there was a search of his mother's house being conducted. Glenn argued that since the vehicle did not belong to the owner of the house, then it should not be considered part of the curtilage. The Court held that even though *Glenn* didn't own the residence, there was evidence that *Glenn* resided there and that is what is controlling in determining if the automobile was part of the curtilage - that the car was owned by an occupant of the residence identified in the search warrant to be searched.

In *Glenn*, the Court stated that, "the great weight of authority supports the proposition that a search warrant authorizing the search of a dwelling covers the occupant's automobiles found within the curtilage of those premises, even where the vehicle is not named in the warrant." *Glenn* at 508 (emphasis added). Further, as Judge Kelsey noted in his opinion, the *Glenn* Court specifically declined to decide the question of a non-occupant's car parked within the area identified in the search warrant to be searched.

Such an analysis, however, would still require some showing of a relationship between the object of the search and the crime alleged. In the present case, there is no evidence that Wilkins owns the property at 3943 Bridge Road. Moreover,

there is no evidence that he resides at this address. Since Wilkins is not an "occupant" of the house being searched, his automobile is not part of the curtilage. Therefore, the search of his El Camino was illegal. Evidence obtained from the search should be held inadmissable as being fruit of an illegal search and a failure to suppress it would be a violation of Mr. Wilkins' rights under the Fourth Amendment to the United States Constitution.

IV THE EVIDENCE SEIZED PURSUANT TO THE WARRANTLESS SEARCH OF THE EL CAMINO WAS NONETHELESS ADMISSIBLE.

In his written opinion Judge Kelsey pointed out that even had any of the objections Wilkins raised been found by him to be valid, it would have made no difference. The argument is that Chappell would have found the results of the El Camino search when Wilkins volunteered the information to him. Thus, whether Wright was right or not becomes immaterial as the contents of the El Camino would have become known when Wilkins led Chappell to it.

The search of the El Camino is not admissible under the doctrine of "inevitable discovery." For the doctrine of inevitable discovery to be appropriate, the Commonwealth must establish, by a preponderance of the evidence, that illegally obtained evidence would have ultimately or inevitably been discovered. *Nix v. Williams*, 467 U.S. 431 (1984). In *Walls v. Commonwealth*, 2 Va. App. 639 (1986), the Court adopted the test set out in *United States v. Brookins*, 614 F2d 1037 (5th Cir. 1980). This test requires the prosecution to show:

> (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the

police misconduct,

(2) that the leads making the discovery inevitable were possessed by the police at the time of the misconduct, and

(3) that the police also prior to the misconduct were actively pursuing the alternative line of investigation.

In *Timbers v. Commonwealth*, 28 Va. App. 187 (1998), the court held that the Commonwealth could not rely on the "inevitable discovery" doctrine because it failed to prove the *Walls* factors. Also, in *Commonwealth v. Ealy*, 12 Va. App. 744 (1991), the Commonwealth could not rely on "inevitable discovery" because it failed to produce any evidence that the police would have eventually had justification for the searching of a garage, that was illegally searched.

In the present case, the Commonwealth has not proved by a preponderance of the evidence even one of the three parts of the *Walls* test. Detective Armstrong stated that while Mr. Wilkins was under surveillance, he was never seen driving any car, other that a brown dodge van. Therefore, there is no probable cause that the El Camino was involved in anything illegal and hence the first part of the test has not been fulfilled.

The second part of the test, evidence of other lines of investigation, there was no testimony regarding the police having any leads that the El Camino or 3943 Bridge Road was involved in any impropriety. The affidavits for the search warrants may be reviewed, in order to determine what the police knew at the time of the misconduct, and from a reading of them it is clear that the police never suspected or even mentioned an El Camino in their reports and only mentioned

Bridge Road once in the eight pages of the affidavit.

The Commonwealth provided no evidence that the police were actively pursuing any alternative lines of investigation regarding the El Camino at the time of the discovery of any evidence and the Commonwealth may claim that they were pursuing other lines by questioning Mr. Wilkins or by obtaining a search warrant on Bridge Road. But the taint of the constitutional violations makes the search results irredeemable:

(1) Mr. Wilkins never received proper *Miranda* warnings and therefore any evidence received by the police would have to be suppressed, including information regarding the El Camino, and

(2) the police had already searched the car illegally because they did not have a proper search warrant.

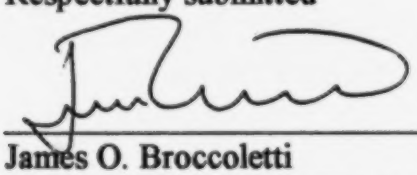
Therefore, if there were any other lines of investigation, they were illegal at best and inadmissable under any circumstances.

It is clear that the Commonwealth has not upheld its burden to convince the court that all three parts of the test have been met. The evidence illegally seized from the El Camino would not have inevitably been discovered and the taint has not been overcome, consequently the evidence must be suppressed

CONCLUSION

For the reasons stated, your petitioner prays that the Court will grant this Petition for Writ of Certiorari.

Respectfully submitted



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No. _____

In The Supreme Court of the United States

EUGENE WILKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

APPENDIX

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EDITOR'S NOTE

ORIGINAL PAGINATION IS NOT CONTINUOUS

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 13th *day of* September, 2002.

Eugene Wilkins, Appellant,

against Record No. 020944
Court of Appeals No. 2973-00-1

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 24th day of July, 2002 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ David B. Beach
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 24th *day of* July, 2002.

Eugene Wilkins, Appellant,

against Record No. 020944
Court of Appeals No. 2973-00-1

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of he record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk
Clerk

By:
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Monday *the* 8th *day of* April, 2002.

Eugene Wilkins,

Appellant,

against Record No. 2973-00-1
Circuit Court Nos. CR00F00016 and CR00F00017

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing En Banc

Before the Full Court

Upon consideration of the petition of the appellant to set aside the judgment rendered herein on the 12th day of February, 2002 and grant a rehearing en banc thereof, the said petition is denied on the grounds that there is no dissent in the panel decision, no member of the panel has certified that the decision is in conflict with a prior decision of the Court, nor has a majority of the Court determined that it is appropriate to grant the petition for rehearing en banc in this case. Code § 17.1-402(D).

A copy,

Teste:

Cynthia L. McCoy, Clerk

By:
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 12th *day of* February, 2002.

Eugene Wilkins,

Appellant,

against Record No. 2973-00-1
Circuit Court Nos. CR00F00016 and
CR00F00017

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Suffolk

Before Judges Bray, Bumgardner and Frank

For reasons stated in writing and filed with the record, the Court is of opinion that there is no error in the judgment appealed from. Accordingly, the judgment is affirmed. The appellant shall pay to the Commonwealth of Virginia thirty dollars damages.

This order shall be certified to the trial court.

A copy,

Teste:

Cynthia L. McCoy, Clerk

By: /s/ Marty V. P. Ring

Deputy Clerk

COURT OF APPEALS OF VIRGINIA

Present: Judges Bray, Bumgardner and Frank Argued at Chesapeake, Virginia

EUGENE WILKINS

v. Record No. 2973-00-1

COMMONWEALTH OF VIRGINIA

OPINION BY
JUDGE ROBERT P. FRANK
FEBRUARY 12, 2002

FROM THE CIRCUIT COURT OF THE CITY OF SUFFOLK
D. Arthur Kelsey, Judge

James O. Broccoletti (Zoby & Broccoletti, on brief), for appellant.

Eugene Murphy, Assistant Attorney General (Randolph A. Beales, Attorney General, on brief), for appellee.

Eugene Wilkins (appellant) was convicted in a bench trial of two counts of possession with intent to distribute cocaine, in violation of Code § 18.2-248. On appeal, appellant contends the trial court erred in ruling (1) appellant was properly informed of his Miranda rights; (2) the search warrant was issued based on probable cause; (3) appellant's vehicle was properly searched; and (4) the evidence seized in the vehicle was admissible. For the reasons stated, we affirm the convictions.

I. BACKGROUND

On February 25, 1999, Detective Frank Chappell of the Portsmouth Police Department was working with an informant who previously had provided information resulting in at least one arrest. The informant reported that for some time he had been buying quantities of narcotics from appellant and Calvin West. He explained that appellant delivered the drugs to West's home on Brookwood Drive in Suffolk, where the drugs then were sold. The informant described appellant's vehicle as a blue van "with a wood grain." As the informant and Chappell were driving to appellant's home, Chappell saw the blue van. They changed direction and followed the van to West's residence, where informant made a controlled purchase.

According to the informant, appellant and West sold drugs at West's home from early morning to early afternoon. Appellant would deliver the drugs to West in the morning and come back later in the afternoon to pick up the proceeds. If the porch light was on at West's residence, then no drugs were for sale; if the light was off, then drugs could be purchased.

On June 16, 1999, the police began surveillance of West's and appellant's homes. Early that morning, appellant was observed driving from his residence on Water View Drive to West's home.

That same day, a different informant made a controlled buy at West's residence. He was unable to buy the drugs before appellant arrived. After appellant arrived, however, the porch light was switched off, and the informant then purchased narcotics.

On June 17, the confidential informant again went to West's home before appellant arrived and was told no narcotics were available. The porch light was on, and West told the informant that he was waiting for appellant to arrive with the

cocaine. On that day, appellant left his home and stopped at 3943 Bridge Road, his mother's home, where he got out of his car and walked to the side of the house behind a large tree. "All [the police] could see was that he went to" the side of the house or towards the side of the garage area, where he remained out of view for a few minutes. He then returned to his van and drove directly to West's residence. The confidential informant then made a purchase from appellant at West's home.

On June 18 at 9:00 a.m., the informant again attempted to make a purchase while the light was on, but West told him that appellant would be "en route shortly with some [cocaine]." At about the same time, appellant was observed driving into a Farm Fresh parking lot. Appellant met with an individual and then proceeded to Bridge Road. At Bridge Road, appellant again got out of the van and went to the side of the house for a short time. He then drove back to his residence, left again at 9:35 a.m., and drove to West's house.

Search warrants were obtained for both appellant's and West's residences. Appellant was stopped at approximately 9:45 a.m. "within a block or two from West's house," and the police searched his van. They found cocaine in sweatpants that were lying in the van between the driver and passenger seats. The police did not find any drugs on appellant.

Both the Brookwood and Waterview houses were searched. No drugs were found at either address. The arresting officers brought appellant back to the Waterview house, but appellant made no statement to Chappell or to any other officer while Chappell was there. Chappell then left to obtain a search warrant for the Bridge Road property. Chappell testified, "[B]ased on what the surveillance was and the observation was, then I felt there was a reason to go to Bridge Road." Chappell went to the magistrate and obtained a search warrant for that

address.

In the affidavit presented to the magistrate to obtain the search warrant for the Bridge Road residence, Chappell stated:

> On 6-17-99, CI#2 was sent to 6117 Brookwood Dr. to purchase cocaine. CI#2 was told by "C.W." that he didn't have anymore cocaine and that he was waiting for "Gene" who was still at home to bring over the cocaine.
>
> Surveillance was again established at 100 Waterview Rd. The home of Wilkins. Wilkins van was parked in the driveway of said address. Wilkins was observed coming out of the house carr[y]ing a white bag, he got into the van and drove to 6117 Brookwood Dr. Prior to stopping at 6117 Brookwood Dr., Wilkins stopped at 3943 Bridge Rd.[,] exited the van and was observed going towards the side door.
>
> CI#2 was given money and sent to 6117 Brookwood Dr. to purchase cocaine. Prior to leaving the CI#2 was searched and found to have no controlled substances. CI#2 was observed going to and inside 6117 Brookwood Dr. CI#2 purchased cocaine from "Gene." CI#2 advised 'that "Gene" and "C.W." had just got through cutting up a quantity of cocaine.
>
> * * * * * * *
>
> On 6-18-99, surveillance was established at 100 Waterview Rd. by Det. DeFreitas. Wilkins was observed coming out of the house and getting into his van, Virginia tag HP/56-561. Wilkins was then followed to a shopping center in the City of Chesapeake, Va. where he met up with a black male. After a brief conversation

both Wilkins and the unknown left in different directions. Wilkins was followed where he stopped at 3943 Bridge Rd. Got out of the vehicle and went up to the side of the house. Wilkins th[e]n returned a short time later and drove back directly back to his home at 100 Waterview Rd.

During the time Wilkins was driven back to his home, CI#2 was at the home of "C.W." as directed by this [affiant] in attempts to purchase cocaine. "C.W." told CI#2 that he didn't have any cocaine and that he was on the phone with "Gene". "C.W." added that "Gene" would be at the house shortly with cocaine. As this phone conversation was occurring between "Gene" and "C.W." Det. Karpowski observed "Gene" talking on a cellular phone while riding down the street.

At approximately 9:45 A.M., Eugene Wilkins was arrested with a quantity of cocaine on his person. When asked about where he had been earlier that morning Wilkins stated that he had only went to the Food Lion and got some bananas and went back home.

Parked in the driveway of 3943 Bridge is a 1978 red & white Chevy El Camaro with Virginia tag PTQ-920. The registered owner is Eugene Wilkins. It was further learned that Wilkins 89 year old mother lives at the address.

Chappell, on cross-examination, conceded the police never saw appellant enter the El Camino or the"Bridge Road house on either visit. The affidavit did not mention that appellant was briefly hidden from view by a "big tree" at the side of the house while at Bridge Road.

The search warrant was signed at 1:30 p.m. Chappell then called Detective M.K. Wright, who was already at the Bridge Road house. When Chappell told him that he had obtained the warrant, Wright entered the El Camino[1], which was parked behind the big tree on the side of the house, and recovered a brown paper bag containing cocaine.

While Chappell went to get the search warrant, Detective L.L. DeFreitas remained with appellant at the Waterview Road house. DeFreitas testified he Mirandized appellant from memory, and appellant said he understood those rights. The detective then asked whether appellant wished to speak with him without an attorney present, and appellant replied that he would. Around noon, appellant said he wanted to speak to a lawyer, and DeFreitas stopped his conversation with appellant. Appellant's wife, who was also present, "constantly" urged appellant to speak with the police and cooperate.

Around 2:30 p.m. appellant asked DeFreitas if he could talk with him in another room. At that point, appellant said he wished to cooperate and tell them where the drugs could be found. DeFreitas responded that he could not talk to appellant because he had asked for a lawyer. Appellant said he had changed his mind and wanted to talk. Appellant then said he would take the officer to the place where the drugs were located.

They drove to the Bridge Road address. Appellant led the detective to the El Camino and indicated the drugs were in the backseat. They then learned the drugs had already been recovered by other officers pursuant to the search warrant. The

---

[1]The El Camino was registered in appellant's name.

trial judge found they "arrived only moments after Detective Wright recovered the evidence."

Later that day, after DeFreitas described the surveillance to him, appellant said, "Okay, so you know that I come here, pick it up, and then go over to CW's. I only sold a little. I use as well. It's for pain. What's the difference, I'll be gone soon anyway." When he asked how much he sold, appellant said he needed to talk to an attorney, and the conversation ceased.

II. MIRANDA RIGHTS

Appellant claims the evidence was insufficient for the trial court to find DeFreitas informed appellant of all his rights under Miranda v. Arizona, 384 U.S. 436 (1966). In examining this claim, the evidence is considered in the light most favorable to the Commonwealth, and the trial court's determination that appellant was informed of these rights will not be overturned unless plainly wrong or without evidence; to support that finding. See Commonwealth v. Benjamin, 28 Va. App. 548, 552-53, 507 S.E.2d 113, 115 (1998).

In the case of Dickerson v. United States, the Supreme Court explained the rule established by Miranda:

> Accordingly, we laid down "concrete constitutional guidelines for law enforcement agencies and courts to follow." [Miranda, 384 U.S.] at 442. Those guidelines established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings. These warnings (which have come to be known colloquially

> as "Miranda rights") are: a suspect "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Id., at 479.

530 U.S. 428, 435 (2000) (emphasis added). Previously, the Supreme Court has called them "the now-familiar warnings." Rhode Island v. Innis, 446 U.S. 291, 310 (1980).

The trial court did not err by inferring from the detective's use of the phrase, "Miranda warnings," during his testimony that he informed appellant of these four rights, although the court was not required to make this inference[2].

The evidence was sufficient to support the trial court's finding.

First, other courts have held that similar testimony was sufficient to prove the Miranda rights were read to a defendant. In Phelps v. Duckworth, for example:

> At trial, the arresting officer testified that he that he"read [Mr. Phelps] his rights" following the arrest. The state argues that this testimony does not conclusively show that the petitioner was read his Miranda

---

[2]Clearly, the Commonwealth risks a finding by the trial court that the complete warnings were not given where an officer testifies only that he informed the suspect of his "Miranda rights."

> warnings as opposed to some other warnings. The state does not speculate as to what other rights Mr. Phelps reasonably might have been read immediately following his arrest.
>
> The district court found that the record revealed that Mr. Phelps was read his Miranda warnings following arrest. We will not set aside a district court's factual finding unless it is clearly erroneous. In reviewing the lower court finding, we may infer reasonable conclusions drawn from the record as a whole.
>
> We fully agree with the district court that Mr. Phelps was given his Miranda warnings by the arresting officer. To hold otherwise, in light of the arresting officer's own testimony, would contradict reason and common sense. The present case is plainly distinguishable from Fletcher v. Weir, 455 U.S. 603, 605 (1982)], where App. 14
>
> there was no evidence in the record that the defendant had been read his rights, Miranda or otherwise. There is nothing in the present record which suggests that the rights read

to Mr. Phelps by the arresting officer were not Miranda rights.[3]

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[3]The prosecution was arguing Mr. Phelps's silence after his arrest could be used to impeach his trial testimony. Phelps, 757 F.2d at

757 F.2d 811, 816, rev'd on altern. gds. en banc, 772 F.2d 1410 (7th Cir. 1985). See also State v. Esser, 480 N.W.2d 541, 543-44 (Wis. Ct. App. 1992) (noting "[t]he phrase 'Miranda rights, conjures up the well-known litany of rights which many citizens could recite verbatim," and affirming a trial court's finding that these rights were read to a suspect, based on evidence that the officer read his "constitutional rights" to the defendant "from a police department Miranda card" that was not introduced into evidence).

Here, the record supports the trial court's finding. DeFreitas testified that, after he arrested appellant, "I Mirandized him" before beginning their initial conversation. The detective admitted he did not read the rights from a preprinted card, but instead recited them "from [his] memory."[4] He also asked appellant "if he understood his rights," and appellant responded that he did. DeFreitas then "[a]sked him if he wished to talk to me without an attorney present."

The record contains no hint that anything other than the traditional Miranda rights were explained to appellant. While other trial courts might not reach the same conclusion, appellate courts must defer to the judge's factual finding where the evidence supports evidence supports that finding. See Benjamin, 28 Va. App. at 552-53, 507 S.E.2d at 115. The evidence here supports the trial court's factual finding that appellant was informed of his Miranda rights.

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815. Such impeachment evidence is allowed only if a defendant was not read his Miranda rights after his arrest. Id. See generally Doyle v. Ohio, 426 U.S. 610 (1976).

[4]Defense counsel did not challenge DeFreitas's memory at trial nor does he challenge it on appeal.

III. SUPPRESSION OF THE DRUGS

Appellant also claims the evidence found in the El Camino should have been suppressed because the search warrant[5] for the Bridge Road house where the car was parked lacked probable cause and because the car was not listed on the warrant as a place to search. Even assuming both these arguments are correct, the evidence should not have been suppressed. The drugs were admissible under the inevitable discovery doctrine even if the warrant and resulting search were improper.

When evidence is collected as the result of an unconstitutional process, normally it should be excluded under the exclusionary rule or as "fruit of the poisonous tree." However, very limited exceptions to this rule do exist. One such exception is the inevitable discovery rule, which is an off-shoot of the independent source doctrine. See Murray v. United States, 487 U.S. 533, 536-39 (1988); Nix v. Williams, 467 U.S. 431, 446-48 (1984); Timbers v. Commonwealth, 28 Va. App.187, 199-201, 503 S.E.2d 233, 238-39 (1998).

The inevitable discovery exception "has long been recognized in Virginia." Walls v. Commonwealth, 2 Va. App. 639, 655, 347 S.E.2d 175, 184 (1986). In order to apply this exception, this Court, in Walls, required a showing that:

> "(1) a reasonable probability [exists] that the evidence in question would have been discovered by lawful means but for the

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[5]The Commonwealth does not argue that appellant lacked standing to object to a search warrant for his mother's home.

> police misconduct, (2) that the leads making the discovery inevitable were possessed by the police at the time of the misconduct, and (3) that the police also prior to the misconduct were actively pursuing the alternative line of investigation.

Id. at 656, 347 S.E.2d at185 (quoting United States v. Cherry, 759 F.2d 11961 12b4 (5th Cir.1985)).

The trial court here concluded the Commonwealth's evidence met this test, finding that DeFreitas arrived "only moments" after Chappell's recovery of the drugs, that the police had appellant in custody prior to any of the alleged misbehavior by Chappell, and that DeFreitas actively pursued the. alternative source of information. As this conclusion involves a mixed question of fact and law, we defer to the trial court's factual findings unless plainly wrong or without evidence to support them, but review the ultimate question of law, the application of the inevitable discovery doctrine, de novo. See Trent v. Commonwealth 35 Va. App. 248, 250, 544 S.E.2d 379, 380 (2001). See also Williams, 467 U.S. at 444 n.5 (inevitable discovery should be proven by a preponderance of the evidence, applying the usual burdens for a motion to suppress).

First, more than a reasonable probability exists that, without the warrant, the police would have recovered the drugs in the El Camino. Obtaining the search warrant had nothing to do with appellant's discussion with DeFreitas. Appellant's decision to voluntarily disclose the location of the drugs provided the police with a completely independent basis for

searching the El Camino.[6] If the officers had never attempted to obtain a search warrant for the Bridge Road address, they still would have arrested appellant. This arrest and events at his home, not the search warrant, prompted appellant to disclose to police that the cocaine was in the backseat of the vehicle.

As appellant actually took DeFreitas to the exact location where the police earlier found the drugs, speculation about an abstract future discovery of the drugs is unnecessary. The evidence here clearly shows discovery of the contraband was more than reasonably probable; it was inevitable, even without the allegedly improper warrant and search.

The second prong of the test was met also. The police "possessed the lead" at the time they applied to the magistrate for the warrant: they had appellant, the "lead," in custody and had Mirandized him. While appellant initially invoked his Miranda rights and did not talk with DeFreitas, the police still had appellant under arrest. Appellant does not contest the legality of this arrest.

Finally, the officers were actively pursuing this alternative source of information. DeFreitas initially asked if appellant wanted to talk to the police. Although appellant appeared uncooperative at that point, the officers did not take him to jail, but instead held him in his home. Clearly, the investigation had not concluded. The police still wanted to hear any information

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[6]Seizure of the drugs based on appellant's statements was constitutionally permissible without a warrant based on both consent to search, Hughes v. Commonwealth, 31 Va. App. 4471 454, 524 S.E.2d 155, 159 (2000) (en banc) , and the automobile exception, McCary v. Commonwealth, 228 Va. 219, 227-281 321 S.E.2d 637, 641-42 (1984). Appellant does not argue this point.

appellant was willing to disclose. They were doing all they could do constitutionally, once appellant invoked his Miranda rights, to pursue this lead.[7]

In this case, DeFreitas's lead was completely separate from the alleged police "misconduct" related to the warrant, as appellant's cooperation was obtained independently of the request for the search warrant.[8] See Cherry, 759 F.2d at 1205 n.11; Walls, 2 Va. App. at, 643, 347 S.E.2d at 177. Chappell, who requested the warrant, did not know about appellants statements when he submitted his affidavit to the magistrate nor when he began the search at Bridge Road. DeFreitas did not know what appellant would say or where the drugs would be found. Appellant did not know about the alleged inadequacies of the warrant and the search. The warrant and search procedure in no way tainted appellant's disclosure of the location of the drugs because the two investigations were independent.

Appellant argues the alternative lines of investigation also

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[7]Appellant was informed of his Miranda rights. See II, supra.

[8]The record does not indicate whether appellant knew Chappell was attempting to get a search warrant for the Bridge Road residence. The allegedly improper actions taken by the police in relation to the warrant and search occurred after Chappell left appellant's home. Nothing suggests that appellant knew about the allegedly improper action or that his decision to talk to DeFreitas was in any way influenced by those actions.

must flow from completely independent sources. However, he cites no authority to support this interpretation of the rule, and we do not believe this pron suggests such an extreme view. The requirement is only that the alternative line of investigation is not tainted by the allegedly unconstitutional source of information, allowing a court to find that "the police would have obtained that evidence if no misconduct had taken place." Williams, 467 U.S. at 444. See also Cherry, 759 F.2d at 1205. See, e.g., United States v. Lamas, 930 F.2d 1099, 1103-04 (5th Cir. 1991) (holding that evidence obtained based on Lamas's invalid consent to search his house was admissible under the inevitable discovery rule where an officer had probable cause and left to obtain a search warrant prior to the improper consent).

This analysis is especially applicable here, where if Chappell had never requested the search warrant and never began his search, DeFreitas still would have recovered the cocaine in the backseat of the El Camino, based on appellant's cooperation. In fact, if the process for obtaining the warrant had been slower, the drugs would have been recovered based on appellant's cooperation rather than the execution of the warrant. Excluding this evidence would exact,"the enormous societal cost of excluding truth," while providing no deterrence of police misconduct because an officer "will rarely, if ever, be in a position to calculate whether [this] evidence sought would inevitably be discovered." Id. at 445.

As the evidence found in the El Camino is admissible under the inevitable discovery doctrine, we do not need to examine appellant's remaining arguments. Any impropriety related to the affidavit and the execution of the search at Bridge Road did not taint the independent investigation by DeFreitas.

Because appellant was informed of his Miranda rights,

and because the inevitable discovery doctrine allowed introduction of the drugs obtained pursuant to the search warrant, we affirm the convictions.

Affirmed.

VIRGINIA:

In the Court of Appeals of Virginia on Wednesday *the* 6th *day of* June, 2001.

Eugene Wilkins,

Appellant,

against Record No. 2973-00-1
Circuit Court Nos. CR00F00016 and CR00F00017

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Suffolk

Before Judge James W. Benton, Jr.

A judge of this Court having determined that this petition should be granted, an appeal is hereby awarded to the petitioner from judgments of the Circuit Court of the City of Suffolk dated December 6, 2000.

Appeal bond or an irrevocable letter of credit in the amount of $500 shall be posted as required by Code § 8.01-676.1(B). The clerk is directed to certify this action to the trial court and to all counsel of record.

Pursuant to Rule 5A:25, an appendix is required in this appeal and shall be filed by the appellant at the time of the filing of the opening brief.

A Copy,
Teste:

Cynthia L. McCoy, Clerk

By: /s/ Marty V. P. Ring

Deputy Clerk

CERTIFICATE OF CLERK

I, Cynthia L. McCoy, Clerk of the Court of Appeals of Virginia, do hereby certify that on June 6, 2001 an appeal was awarded as described in the order to which this certificate is appended. A copy of this certificate and a copy of the order to which it is appended were this day mailed to the trial court indicated in the order and to all counsel of record.

Given under my hand this 6th day of June, 2001.

Cynthia L. McCoy, Clerk

By: /s/ Marty V. P. Ring

Deputy Clerk

SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT OF THE **CITY OF SUFFOLK**

HEARING DATE: **DECEMBER 6, 2000**
JUDGE: **D. ARTHUR KELSEY**
COMMONWEALTH OF VIRGINIA

V. CASE NO. **CR00F00017 (ENDED)**

EUGENE WILKINS, DEFENDANT
SSN: 230-66-5467 DOB: 6-24-1945

This case came before the Court for sentencing of the defendant, who appeared in person with his attorney, James Broccoletti. The Commonwealth was represented by W. Randolph Carter, Jr.

On the 4th day of October, 2000, the defendant was found guilty of the following offense:

Offense Description and Indicator (F/M) and Code Section and Offense Date:

POSSESSION WITH INTENT TO DISTRIBUTE COCAINE (§18.2-248) (FELONY) (OFFENSE DATE: JUNE 18, 1999)

The presentence report was considered and is ordered filed as a part of the record in accordance with the provisions of Code §19.2-299.

Pursuant to provisions of Code §19.2-298.01, the Court has considered and reviewed the applicable discretionary

sentencing guidelines and the guideline worksheets. The sentencing guidelines worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

Before pronouncing sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:

Incarceration with the **Virginia Department of Corrections** for the term of **Eight (8) years and Three (3) months.** The total sentence imposed is **Eight (8) years and Three (3) months.**

Concurrent. The Court adjudges and orders that the Eight (8) year and Three (3) month sentence this day imposed shall run concurrently with the Eight (8) year and Three (3) month sentence heretofore imposed upon the defendant by this Court on this date, in case no. CR00F00016.

The Court **SUSPENDS Two (2) years** of the **Eight (8) year and Three (3)** month sentence, for a period of **Five (5) years,** upon the following conditions:

Good Behavior. The defendant shall be of good behavior for **Five (5) years** from the defendant's release from confinement.

Supervised Probation. The defendant is placed. on probation on his release from incarceration, under the supervision of a Probation Officer for **Five (5) years,** or unless sooner released by the court or by the probation officer. The defendant shall comply with all the rules and requirements set by the probation officer. Probation shall include substance abuse counseling and/or testing as deemed necessary by the Probation Officer.

Costs. The defendant shall pay costs of $ 498.00 within twelve (12) months of his release.

Credit For Time Served. The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Code §53.1-187.

Appeal. Thereupon, the Court advised the defendant of his right to petition for an appeal to the Court of Appeals of Virginia, and the defendant, by counsel, so acknowledged his desire to note an appeal and further requests the Court to make the transcript of the testimony and other incidents of trial a part of the records in this case, and is so ordered.

Entered the 6th day of December, 2000

/s/ D. Arthur Kelsey, JUDGE

DEFENDANT IDENTIFICATION:

Alias: unknown
SSN: 230-66-5467 DOB: 6-24-1945 SEX: Male
SENTENCING SUMMARY:
TOTAL SENTENCE IMPOSED: Eight (8) years and Three (3) months
TOTAL SENTENCE SUSPENDED: Two (2) years
TOTAL TIME TO SERVE: Six (6) years and Three (3) months
WILKINS
CR00F00017

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF SUFFOLK

COMMONWEALTH OF VIRGINIA

v. CR99-00226

EUGENE WILKINS

OPINION AND ORDER

The Commonwealth accuses Eugene Wilkins of two counts of possession of cocaine with intent to distribute in violation of Va. Code Ann. §§ 18.2-248 and 18.2248.1 (Michie 1996 & Supp. 2000). In his pretrial motion to suppress, Wilkins claims the Commonwealth obtained in-custody statements from him in violation of the Fifth Amendment and collected physical evidence against him in violation of the Fourth Amendment.[1] For the following reasons, the Court denies the motion.

I.

According to the Commonwealth, the defendant has been a "major supplier of crack cocaine" in both Suffolk and Portsmouth for several years. See Commonwealth Ex. I (search warrant affidavits). The investigation into his activities began in February 1999 when officers of the Suffolk and Portsmouth Police Departments conducted a controlled purchase" of cocaine through the use of a confidential

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[1] See Defendant's Motion to Suppress (Jan. 6, 2000), Defendant's Response to Bill of Particulars (Apr. 19, 2000); Defendant's Letter Brief (July 20, 2000).

informant. See Hearing Transcript at 17-23.

The informant, CI[1], purchased cocaine from the home of Calvin West on February 25, 1999, after the defendant had allegedly dropped off the product at West's home just prior to the purchase. Id. From conversations between West and CI[1], the police learned that the defendant supplied the cocaine in marketable quantities to West. Purchasers from West would know that a delivery by the defendant had taken place by looking at West's porch light: if the light was on, business was off; if the light was off, business was on. Id. at 21-23. CI[1]l also stated that the defendant carried a handgun and would typically stay at West's home to assist in the sales taking place throughout the day. See Commonwealth Ex. I (search warrant affidavits).

Again on June 16, 1999, the police conducted a similar controlled purchase from West's home. See Hearing Transcript at 24-30. As before, the defendant drove his brown Plymouth van to West's home (while the porch light was on) and dropped off the cocaine for resale (after which the light was turned off. The defendant carried a "white bag" as he left his own home and brought it with him when he entered West's home. See Commonwealth Ex. I (search warrant affidavits). On this occasion, a different confidential informant, CI[2], went into West's home and met with the defendant. Id. The defendant pulled a "large piece of crack cocaine" from the white bag and sold it to CI[2]. Id.

A similar pattern developed on June 17, 1999, with one variation. On that day, the defendant stopped by an intermediate location (a house on Bridge Road in Suffolk) between leaving his home and arriving at West's home to make the drop off. During their surveillance at the Bridge Road location, police officers saw the defendant walk "to the

side of the house or towards the side of the garage area." Id. at 29. The officers briefly lost visual contact with the defendant because of a "big tree on the side of the house." Id. at 35. The police observed the defendant "coming and going" from this same area. Id. An El Camino vehicle (later discovered to be owed by the defendant) was "parked right behind the big tree" on the side of the house. Id. Then "just a few minutes, very short few minutes" later, the defendant got back in his van and drove "straight" to West's home to make the cocaine drop. Id. at 29. CI[2] arrived later and made another controlled purchase directly from the defendant. See Commonwealth Ex. I (search warrant affidavits).

Based upon the information then in hand, the police secured search warrants for West'.s home (6117 Brookwood Drive, Portsmouth), the defendant's home (100 Waterview Road, Suffolk), and the defendant personally. Id. The next day, June 18, the police decided to conduct a fourth controlled purchase before arresting the defendant. CI[2] went to West's home early that morning. The porch light was on, indicating that the defendant had not yet made his delivery. See Hearing Transcript at 30. CI[2] spoke with West to confirm this. Id, at 31. West said he had no cocaine, but the defendant "would be en route shortly with some." Id. During the conversation between West and CI[2] , West called the defendant on a cell phone at about 9:00 a.m. Id. The police, who had been tracking the defendant's movements, saw the defendant answer the cell phone call while driving in his van. Id. at 31-32.

The defendant drove his van to the Bridge Road location. See id. at 32; Commonwealth Ex. I (search warrant affidavits). Once there, the defendant "got out of the vehicle and went to the side of the house again." Hearing Transcript at 32. As before, the defendant walked "right

behind the big tree, and exactly behind the big tree is where the El Camino was." Id. at 58. The defendant stayed a "short time" at the Bridge Road premises and then made a brief stop at his own home before driving to West's residence on Brookwood Drive. Id. at 31-32.

By this time, however, West had become suspicious. Before the defendant's arrival, West got in his car and drove away from his home. Id. at 33. About a block or so from his home, West passed the defendant's van, slowed down briefly, and continued to drive away. Id., at 33. Realizing that the sting had begun to fall apart -- or, to put it in police vernacular, that they had been "burnt" -- officers on the tactical team stopped the defendant's van less than a block or two from West's house and arrested the defendant for distributing drugs. Id. at 50-51.

The arrest took place at approximately 9:45 a.m. on June 18. Id. at 48. The police conducted a search and discovered cocaine in the pockets of blue "sweat pants" located between the driver and passenger bucket seats of the van. Id. at 79 & 52. The drop-off routine used in prior occasions, plus CI[2]'s confirmation that the defendant "transported drugs in a van," led the officers to believe probable cause existed for the vehicle search. Id. at 48. They also believed it likely that, absent the search and recovery, evidence "could be destroyed." Id. at 50.

After the defendant's arrest, the police drove him back to his own home. At the defendant's home, a member of the Special Investigations Unit, Detective DeFreitas, asked the defendant "if he had been Mirandized," and he said "he didn't know." Hearing Transcript at 63. The detective then "Mirandized" the defendant. Id., DeFreitas recited the

Miranda warnings from his "memory" without using notes or a preprinted card. Id. at 72. The detective then asked the defendant "if he understood his rights." Id. at 63. The defendant replied that "he understood his rights," Id.

The detective then asked the defendant "if he wished to talk to [him] without an attorney present." Id. at 63. The defendant said "yes, he would talk" to the detective. Id. Freitas and the defendant had a "continuous" conversation until about noon when the defendant announced that "he wanted to speak to a lawyer." Id. at 64. The detective promptly suspended any further interrogation. "I told him I couldn't talk to him any more," the detective explained. Id.

The defendant's wife disagreed with her husband's decision and argued with him about it. As the detective remembers it: "She was constantly badgering Mr. Wilkins about cooperating with the police and telling the police if he knew where the drugs were, or any, drugs, and she couldn't believe that he was involved in that, and if he was, that he should cooperate." Id. at 65; see also id., at 73-74.[2]

At about 2:30 p.m., the defendant deferred to his wife's wishes and told Detective DeFreitas that he wanted to talk "in another room." Id. at 65. After walking down the hall to an unoccupied bathroom, the defendant announced that "he wanted to cooperate and tell [the police] where the drugs

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[2]Detective DeFreitas testified that he did nothing to encourage the defendant's wife to influence her husband on this point. See Hearing Transcript at 65. The defendant has not challenged this testimony.

were." Id. DeFreitas said "no," he could not talk with him "because he had already asked for an attorney" earlier in the day. Id, at 66.

The defendant explained that he had "changed his mind" and now "wanted to talk." Id. He then said that he would take Detective DeFreitas "to where the drugs were." Id. DeFreitas brought the defendant back into the front room of the house, in the presence of two other detectives, where the defendant confirmed that he had changed his mind and now wanted to "talk without an attorney." Id. at 67. The defendant then told Detective DeFreitas that the drugs could be found in his vehicle (the El Camino) at the Bridge Road location, id. at 67, the same place he had visited on June 17 and 18 prior to arriving at West's home.

The defendant and DeFreitas drove to the Bridge Road location together. The defendant walked with DeFreitas over to the El Camino and said, "it is in the back seat." Id. at 68. Detective DeFreitas looked, but found nothing.

Though DeFreitas did not know it at the time, just a "few minutes" before his arrival another police officer (Detective Wright) had searched the El Camino and found cocaine and digital scales. Id. at 68 & 78. Wright conducted the search after receiving a radio call from another officer, Detective Chappell, stating that he had just obtained a search warrant for the Bridge Road location. Id. at 77. Both Wright and Chappell were unaware that the defendant had confessed to DeFreitas and agreed to the search of the El Camino. Id. at 79 & 53-54, 59. The search by Wright was "purely based" on Chappell's newly issued warrant. Id.

Detective Chappell, a seventeen-year veteran of the force, had decided to secure the search warrant for the Bridge

Road location not long after the defendant's arrest that morning. Id. at 34. He had prepared the original affidavits in this case (as well as over 300 or, more during his career), and he drafted the affidavit for the Bridge Road location because he believed it served as a "stash house" for the drug distribution scheme. Id. at 53. This conclusion rested on several considerations: (i) the defendant made two brief, suspicious visits to the side of the Bridge Road home before making anticipated cocaine deliveries at West's home, (ii) the defendant in fact had cocaine with him at the time of his arrest, and (iii) the defendant kept a vehicle in the "same area" (near the big tree) that he was "observed coming and going from." Id. at 35, 39, 53-54, 57-58; see also Commonwealth Ex. 1 (search warrant affidavit for Bridge Road).

Chappell's affidavit for the warrant included almost verbatim all of the information about the distribution pattern presented in the earlier affidavits, but added that on both June 17 and 18 the defendant stopped at the Bridge Road location. On June 17, he "was observed going towards the side door." Commonwealth Ex. 1 (search warrant affidavit for Bridge Road). On June 18, he also "went up to the side of the house." Id. The affidavit then went on to state that the defendant, as he had before, later went to West's home to drop off the cocaine. Id. The search warrant affidavit noted that an El Camino, owned by the defendant, was "parked in the driveway" of the Bridge Road residence. Id.[3]

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[3]In addition, the affidavit states" that the affiant, -Detective Chappell, had been in law enforcement for many years and had extensive experience investigating narcotics offenses. See Commonwealth Ex. 1 (affidavit for Bridge Road search warrant). Over the years, Chappell had attended "several hundred hours" of professional education on the topic of drug distribution. Id.

The affidavit contained one notable mistake. The affidavit asserted that earlier that morning, police had arrested the defendant and found "a quantity of cocaine on his person." Id. In fact, the police found the cocaine in a pair of sweat pants in the defendant's van - between the driver and passenger seats. See Hearing Transcript at 79, 52, 55,-56. In any event, the magistrate accepted the affidavit's proffer of probable cause and issued the search warrant for the Bridge Road home "with a carport" and any "out buildings and curtilage." Commonwealth Ex. 1 (search warrant for Bridge Road location). The magistrate issued the warrant at 1:30 p.m., about an hour before the defendant's confession. Cf. id. (time entry on warrant) with Hearing Transcript at 65.

The defendant challenges the admissibility of his in-custody statements to Detective DeFreitas, including the one that led them to the defendant's vehicle at the Bridge Road location in search of cocaine. The interrogation, the defendant contends, violates the principles of Miranda v. Arizona, 384 U.S. 436, 469-73 (1966); see also Dickerson v. United States, 530 U.S.____, 120 S. Ct. 2326 9200) (reaffirming the continued viability of Miranda). For two independent reasons, the Court disagrees.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself" U.S. Const. amend. V. A suspect subject to custodial interrogation "has the right to consult with an attorney and to have counsel present during questioning," and that the police must "explain this right" to the accused before questioning begins. Shackleford v. Commonwealth, 32 Va. App. 307, 322, 528 S.E.2(l 123, 131 (2000) (quoting Davis v. United States, 512 U.S. 452, 457 (1994)).

Once advised of his Miranda rights, a suspect may make

a knowing and intelligent waiver of those rights and respond to the police interrogation. See North Carolina v. Butler, 441 U.S. 369, 373-75 (1979); Shackleford, 32 Va. App. at 322, 528 S.E. 2d at 131. The Commonwealth must prove by a preponderance of the evidence that the waiver was made voluntarily, knowingly, and intelligently. Shackleford, 32 Va. App. at 32:2-23, 528 S.E.2d at 131 (citing Goodwin v. CommonwealLh, 3 Va. App. 249, 252, 349 S.E.2d 161, 163 (1986)).

The defendant argues that "there is no testimony in the present case that this [the rigfit to counsel] or any other rights were mentioned." Defendant's Letter Brief at 2 (July 20, 2000). Without actually coming out and saying it, the defendant apparently contends that Detective DeFreitas's shorthand expression "I Mirandized him" does not carry any intrinsic meaning. To shoulder its burden of persuasion, the defendant implies, the Commonwealth had to ask Detective DeFreitas to recitefrom the witness stand the well-known. Miranda incantation.

It goes without saying, however, that "Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture." Dickerson, 120 S. Ct. at 2336. It has become so much a part of our national culture that courts routinely refer to the act of a police officer providing the Miranda warnings as having "Mirandized" a suspect. To be sure, the very fact that a *case name* has so effortlessly morphed into a *verb* shows that it has acquired through common use a colloquial meaning - one well known both by the courts and the public.[4]

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[4]For examples of Virginia courts using the shorthand expression "Mirandized" to describe the act of giving the Miranda warnings, see

In this case, Detective DeFreitas testified that he personally "Mirandized" the defendant before initiating any conversation with him. He recited the Miranda warnings by memory and made sure the defendant "understood his rights." Hearing Transcript at 63, 72. The interrogation abruptly ended when the defendant insisted on exercising his right to an attorney. Id. at 64. At that time, DeFreitas made it clear that he could not talk with the defendant anymore. Id.

Later in the day, when the defendant decided to cooperate, Detective DeFreitas again "told him no, I couldn't talk to him because he had already asked for an attorney and I couldn't talk to him." Id. at 66. The defendant made clear, however, that he wanted to waive the right to counsel. DeFreitas then confirmed, in the presence of two other detectives, that the defendant wanted "to cooperate and talk without an attorney." Id, at 67.

The testimony of Detective DeFreitas satisfies the Commonwealth's burden of showing that the defendant received an adequate warning and chose voluntarily to talk with DeFreitas without the presence of counsel. Indeed, the fact that the defendant insisted upon one of his Miranda rights (albeit until his wife talked him out of it) corroborates the conclusion that he received a constitutionally compliant

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Taylor v. Commonwealth, 31 Va. App. 54, 58, 521 S.E.2d 293, 295 (1999); Mitchell v. Commonwealth, 30 Va. App. 520, 527, 518 S.E.2d 330, 333 (1999); Hayes v. Commonwealth, 29 Va. App. 647, 651, 514 S.E.2d 357, 359 (1999); Welshman v. Commonwealth, 28 Va. App. 20, 28, 502 S.E.2d 122, 126 (1998); Giles v. Commonwealth, 28 Va. App. 527, 531, 507 S.E.2d 102, 105 (1998), Green v. Commonwealth, 27 Va. App. 646, 648, 500 S.E.2d 835, 836 (1998); Pemberton v. Commonwealth, 17 Va. App. 651, 653, 440 S.E.2d 420, 422 (1994).

warning.[5] For this reason, the defendant's motion to suppress must be denied.

The motion also fails for a second, and more fundamental, reason. In Miranda, the U.S. Supreme Court made clear that "[volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." Miranda, 384 U.S. at 478. No interrogation exists within the meaning of Miranda when the suspect initiates the conversation. See Gates v. Commonwealth, 30 Va. App. 352, 355-56, 516 S.E.2d 731, 733 (1999); see also Jenkins v. Commonwealth, 244,Va. 445, 453, 423 S.E.2d 360, 365 (1992). It makes no difference whether the suspect is in custody at the time of the volunteered statement. Nor does it matter that the suspect had been subjected, at other times, to interrogation. See Bradshaw v. Commonwealth, 228 Va. 44, 490, 323 S.E.2d 567, 570-71 (1984) (a "spontaneous admission," after an earlier refusal to cooperate, does not violate Miranda).

As noted earlier, the defendant's confession did not come in any response to any custodial interrogation. The questioning of Detective DeFreitas had ended two and a half hours earlier when the defendant stated he wanted an attorney. At the time of the confession, no "objective observer" would have viewed the words or actions of DeFreitas as being "designed to elicit an incriminating response" from the defendant. Gates, 30 Va. App. at 355-56,

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[5]Though the defendant does not carry the burden of proof, it is telling that the defendant's counsel failed to question Detective DeFreitas on *any* specific warnings after the Detective testified that he "Mirandized" the defendant.

516 S.E2d at 733 (citations omitted).

Volunteered statements of this kind should be admitted if they are "neither induced nor initiated by the officer." Bradshaw, 228 Va. at 490, 323 S.E.2d at 570-71. To put it differently, police investigators "do not interrogate a suspect simply by hoping that he will incriminate himself" Jenkins, 224 Va. at 453, 423 S.E.2d at 365 (quoting Arizona v. Mauro, 481 U.S. 520, 529 (1987)). For this reason as well, the Court denies the motion to suppress the defendant's in-custody statements to Detective DeFreitas.

III.

The defendant also claims Fourth Amendment violations took place during the issuance and execution of the search warrants in this case.[6] "Evidence obtained in violation of the Fourth Amendment is inadmissible in a criminal prosecution for a charged criminal violation pertaining to the seized evidence." Anderson v. Commonwealth, 20 Va. App. 361, 363, 457 S.E.2d 396, 397 (1995), aff'd, 251 Va. 437, 470 S.E.2d 862 (1996). For this reason, the defendant contends, the evidence seized from his van (stopped on the way to West's home) and from his El Camino (parked at the Bridge Road residence) should be suppressed.

With respect to both searches, the defendant raises two levels of objections. First, the defendant argues that the

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[6]To the extent the defendant invokes constitutional guarantees arising under Article 1, § 10 of the Virginia Constitution, the state law analysis' tracks the federal law interpreting the Fourth Amendment of the U.S. Constitution. See Henry v. Commonwealth, 32 Va. App. 547, 551, 529 S.E.2d 796, 798 (2000).

affidavits provided insufficient information upon which the magistrate could make a probable cause finding. Second, the defendant contends that the warrants, in any event, did not apply to the defendant's two vehicles.

The defendant's first argument requires an examination of basic principles of probable cause - the essential requirement for the issuance of any search warrant consistent with the Fourth Amendment.[7]

> Probable cause, as the very name implies, deals with probabilities. These are not technical; they are the factual and practical considerations in every day life on which reasonable and prudent men, not legal technicians, act. Probable cause exists when the facts and circumstances within the arresting officer's knowledge and of which he has reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense had been or is being committed.

Henry v. Commonwealth, 242 Va. 413, 421, 410 S.E.2d 662, 666 (1991) (citation omitted). In determining whether the affidavits are sufficient, courts "must look to the totality of the circumstances." Id. (citing Illinois v. Gates, 462 U.S. 213, 230-31 (1983)).

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[7]"[N]o warrants shall issue, but upon probable cause, supported by oath or affirmation." U.S. Const. amend. IV. See Lester v. Commonwealth, 30 Va. App. 495, 500, 518 S.E.2d 318, 320 (1999); Gwinn v. Commonwealth, 16 Va. App. 972, 974, 434 S.E.2d 901, 903 (1993).

Probable cause is a "flexible, common-sense standard" - one that does not "demand any showing that such a belief be correct or more likely true than false." Texas v. Brown, 460 U.S. 730, 742 (1983) (citations and internal quotation marks omitted). "A practical, nontechnical probability that incriminating evidence is involved is all that is required." Id. In other words, the process "does not deal with hard certainties, but with probabilities." Id. "Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same - and so are law enforcement officers." Id.

Given the fluid nature of the probable cause concept, both the U.S. Supreme Court and the Virginia Supreme Court have rejected "a hypertechnical, rigid, and legalistic analysis" of probable cause. Illinois, 462 U.S. at 238-39; Derr, 242 Va. at 421, 410 S.E.2d at 666. Under this "common sense" approach, the magistrate's task

> is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for ... concluding' that probable cause existed.

Id. citations omitted).

An "after-the-fact review of a magistrate's decision should not be made *de novo,*" and thus, "great deference

should be given to the magistrate's finding of probable cause." Derr, 242 Va. at 421, 410 S.E.2d at 666; see also Illinois, 462 U.S. at 236; Garza v. Commonwealth, 228 Va. 559, 563, 323 S.E.2d 127, 129 (1984). And for good reason: a "grudging or negative attitude" by the courts directly conflicts with the Fourth Amendment's "strong preference" for searches conducted pursuant to a warrant. Id.; see also United States v. Ventresca, 380 U.S. 102, 108-09 (1965). As a result, "the scrutiny applied to a magistrate's probable-cause determination to issue a warrant is *less than* that for warrantless searches." Ronald J. Bacigal, Virginia Criminal Procedure § 4-17, at 85 (4th ed. 1999) (quoting Omelas v, United States, 517 U.S. 690, 699 (1996)) (emphasis added).

After all, the nexus between the "items to be seized and the place to be searched may be established by the nature of the item and the normal inferences of where individuals would likely keep such items." Ronald' J. Bacigal, Virginia Criminal Procedure § 4-6 at 67 (4th ed. 1999). In other words, the magistrate "need only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit." Gwinn v. Commonwealth, 16 Va. App. 972, 975, 434 S.E.2d 901, 903 (1993) (citations omitted).

In the case of "drug dealers," a magistrate can draw reasonable inferences when evaluating likely places where the contraband might be found. Id. It need not be shown "more likely true than false" that incriminating evidence would be found at the location specified in the warrant, Texas, 460 U.S. at 742, only that the likelihood of a successful search would be consistent with "common-sense conclusions about human behavior," id.

Given the totality of the circumstances, probable cause existed for the issuance of the search warrants in this case.

The police investigation outlined in the various affidavits shows a sufficient likelihood that the defendant had been (and continued to be) engaged in a predictable pattern of drug distribution. The allegations involving the:

- "several years" of purchases allegedly made by an informant from this drug ring,

- three controlled purchases by two confidential informants,

- consistent use of the porch light signal, cell-phone call just prior to West's unexpected departure before the final aborted sale,

- defendant's actual participation in sales. to end-users, defendant's reputation as a "major supplier of crack cocaine," and other details provided by the confidential informants

all demonstrate that a search of the defendant and his vehicles might likely find the incriminating evidence sought by the warrants.[8]

That conclusion applies not only to the search warrants for the defendant personally and the West residence, but also for the search of the residence and "curtilage" at the Bridge

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[8]Generally, an informant's controlled buy constitutes probable cause sufficient for a magistrate judge to issue an arrest warrant. McGuire v. Commonwealth, 31 Va. App. 584, 596, 525 S.E.2d 43, 49 (2000) (citation omitted); Tamburino v. Commonwealth, 218 Va. 821, 825-26, 241 S.E.2d 762, 765 (1978)). The same should be equally true for search warrants.

Road location. The affidavit made clear that the defendant parked one of his cars there and made two brief, suspicious visits to the side of the home on both June 17 and 18 prior to driving to the West residence to make his drop off. And, as expected, he had cocaine with him at the time of his arrest. Searching an area visited by a suspected drug dealer just prior to his last two drug deliveries satisfies the common-sense test for sufficiency required by the Fourth Amendment.

Even if the warrants could be attacked on sufficiency grounds, Virginia has embraced and applied the good faith exception to the exclusionary rule." Polston v. Commonwealth, 255 Va. 500, 503, 498 S.E.2d 924, 926 (1998). Under this exception, " evidence illegally seized is admissible if the officer conducting the search reasonably relied on a search warrant issued by a detached and neutral magistrate. "Colaw v. Commonwealth, 2000 WL 978740 at **2-3 (Va. App. July 18, 2000) (quoting Atkins v. Commonwealth, 9 Va. App. 462, 464, 389 S.E.2d 179, 180 (1990)).

In the ordinary case, "an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." Tart v. Commonwealth, 17 Va. App. 384, 390, 437 S.E.2d 219, 222 (1993) (citation omitted). Thus, the "deterrent effect of the exclusionary rule 'is absent where an officer, acting in objective good faith, obtains a search warrant from a magistrate and acts within the scope of the warrant.'" Janis v. Commonwealth, 22 Va. App. 646, 653, 472 S.E.2d 649, 653 aff'd en banc, 23 Va. App. 696, 479 S.E.2d 534 (1996) (citation omitted).

The good faith exception does not apply in four situations: where (i) the magistrate was misled by information

in the affidavit which the affiant knew was false or should have known was false, (ii) the issuing magistrate "totally abandoned his judicial role," (iii) the warrant was based on an affidavit "so lacking in indicia of probable cause" as to render official belief in its existence unreasonable, or (iv) the warrant was so "facially deficient" that an executing officer could not reasonably have assumed it was valid. Polston, 255 Va. at 503, 498 S.E.2d at 926; Colaw, 2000 WL 978740 a t **2-3; Robinson v. Commonwealth, 19 Va. App. 642, 647, 453 S.E.2d 916, 918 (1995); Atkins, 9 Va. App. at 464, 389 S.E.2d at 180.

Neither of the four disqualifying situations exists here. Nothing in the warrant affidavits materially misled the magistrate. Though the affidavit for the Bridge Road warrant mistakenly stated that drugs had been found on the defendant's "person" (rather than in the van he was driving), this error could not have a material impact on the probable cause determination. Nor did the magistrate totally abandon his judicial role or accept a bare-bones affidavit "so lacking in indicia of probable cause" or "so facially deficient" that reliance on it could be challenged as patently unreasonable. The good faith exception to the exclusionary rule, therefore, further protects the Bridge Road warrant from challenge.

The defendant's second argument, dealing with the *scope* of the search warrants, raises several issues. To begin with, the defendant correctly points out that the search warrant for him personally did not authorize a search of the van he was driving. This proposition, standing alone, runs into the well-recognized exceptions to the warrant requirement for searches of automobiles generally and searches of vehicles incident to lawful arrests.

Because of the mobility of vehicles, they may be searched without a warrant if a police officer has probable

cause to believe that the vehicle contains contraband. See Pennsylvania v. Labron & Kilgore, 518 U.S. 938, 940 (1996) ("[I]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment ... permits police to search the vehicle without more."); United States v. Ross, 456 U.S. 798, 806-08 (1982); Carroll v. United States, 267 U.S. 132, 149 (1925); McCary v. Commonwealth, 228 Va. 219, 227-28, 321 S.E.2d 637, 641 (1984). The officers who arrested the defendant, therefore, had authority to search his van given the abundant probable cause that it contained cocaine destined for delivery at the West residence.

Moreover, the search of the defendant's van constituted a search incident to a lawful arrest. "The only prerequisites to a search of an automobile incident to arrest are that the search is contemporaneous with the arrest and the arrestee's recent occupancy of the vehicle." Armstrong v. Commonwealth, 29 Va. App. 102, 112-113, 5 1 0 S.E.2d 247, 252 (1999); Glasco v. Commonwealth, 26 Va. App. 763, 773, 497 S.E.2d 150, 154 (1998), aff d, 257 Va. 433, 513 S.E.2d 137 (1999). The circumstances surrounding the search of the defendant's van satisfy both prerequisites,' rendering the search lawful under the search-incident-to-arrest exception to the warrant requirement.

The defendant makes a different argument concerning the search of his El Camino parked at the Bridge Road residence. He claims that the warrant did not authorize the search of his vehicle, only the residence itself. The affidavit, however, identified clearly the presence of one of the defendant's vehicles at the Bridge Road location. The affidavit also described the defendant's brief visits to this location on June 17 and 18, shortly before the defendant's arrival at the West drop-off site. And the warrant itself, while

not referring directly to any vehicles, specifically applied to the "curtilage" of the dwelling. See Commonwealth Ex.1 (search warrant for Bridge Road location).

The "great weight of authority supports the proposition that a search warrant authorizing the search of a dwelling covers the occupant's automobiles found within the curtilage of those premises, even where the vehicle is not named in the warrant." Glenn v. Commonwealth, 10 Va. App. 150, 156, 390 S.E.2d 505, 508-09 (1990); Kearney v. Commonwealth, 4 Va. App. 202, 205, 355 S.E.2d 897, 899 (1987). The defendant concedes this general point, but argues that it does not resolve "whether a vehicle of someone other than an occupant of the premises could be searched." Glenn, 10 Va. App. at 156 n. 1, 390 S.E.2d at 508 n. 1. That precise issue has not been addressed by either the federal or state courts in Virginia.

The fundamental issue here stems from the constitutional requirement that only warrants "particularly describing the place to be searched" may be lawfully issued. U.S. Const. amend. IV. The curtilage of a dwelling, as one commentator has argued, would ordinarily be thought to cover only "vehicles under the control (actual or apparent) of the person whose premises are described." 2 Wayne R. LaFave, Search & Seizure § 4.1(c), at 668 (3d ed. 1996). But the "language in many of the decisions," this commentator admits, "suggests no such limitation" on the concept. Id. Indeed, courts have taken several different positions on this issue.

The U.S. Court of Appeals for the Seventh Circuit restricts searches to those vehicles over which the owner or occupier of the premises has exercised dominion and control. See United States v. Percival, 756 F.2d 600, 612-13 (7th Cir.

1985). The Fifth Circuit has rejected the dominion and control test, thereby permitting the search to include any vehicle located on the searched premises. See United States v. Cole, 628 F.2d 897, 899 (5th Cir. 1980) (allowing search of a vehicle driven onto the premises during; the execution of a search warrant). The Tenth Circuit has settled for a rule permitting an officer to search a vehicle if he acted "reasonably" in assuming (even if the assumption is later found to be in error) that the owner of the premises had control over the vehicle. See United States v. Gottschalk, 915 F.2d 1459, 1461 (10th Cir. 1990).

Like so many issues arising out of the simple constitutional maxim condemning unreasonable" searches, the curtilage question does not lend itself to bright-line answers. The Fourth Amendment requirement of particularity "varies to some degree by what is reasonably practicable." 2 Wayne R. LaFave, supra, § 4.10(c), at 668. From a, practical point of view, the curtilage concept should include only those vehicles which the affiant asserts have a logical link to the premises and to the target of the investigation. An inflexible rule requiring that the vehicle owner also be an occupant or owner of the premises should be rejected as both arbitrary and overly technical. When dealing with search warrants, "there is no place for technical requirements of elaborate specificity once exacted under common law pleadings." United States v. Napoli, 530 F.2d 1198, 1200 (5th Cir. 1976) (quotation marks and citation omitted).

Under a logical-link standard, when the investigation targets the owner of the premises, his vehicles would naturally be included with the curtilage description "even where the vehicle is not named in the warrant." Glenn, 10 Va. App. at 156, 390 S.E.2d at 508-091. When the affiant asserts that the *owner of the vehicle* (but not the owner of the premises) is the

target of the investigation and probable cause exists linking the target to the premises, a logical link exists between the suspect, the non-suspect's premises, and the suspect's vehicle. A search of the vehicle under these circumstances should likewise be valid.

Here, the search warrant affidavit asserted that (i) the suspect owned the El Camino, (ii) the vehicle was parked at the Bridge Road premises, and (iii) the suspect made two brief stops at the premises on June 17 and 18 prior to arriving at the West residence with deliveries of cocaine. These facts show a common-sense relationship between the suspect, premises, and vehicle. See Napoli, 530 F.2d at 1200 (a camper owned by suspect may be searched when parked at premises owned by the suspect's mother); United States v. Beall, 581 F. Supp. 1457, 1466 (D. Md. 1984) (a warrant for search of an auto body shop justifies search of a truck parked in shop), aff'd, 767 F.2d 913 (4th Cir. 1985).[9] Because a sufficiently logical link exists, the "curtilage" description in the Bridge Road warrant includes the defendant's El Camino.

That said, even if the "curtilage" did not include the vehicle, the cocaine found during the search would still have been legally recovered (without the Bridge Road search warrant) when the defendant and Detective DeFreitas arrived minutes later to search the El Camino. The defendant led DeFreitas directly to the vehicle and agreed to the search. Searches conducted with the accused's consent do not

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[9]Though reserving for another day the issue "whether a vehicle of someone other than an occupant of the premises could be searched," Glenn, 10 Va. App. at 156 n. 1, 390 S.E.2d at 508 at n.1, the Virginia Court of Appeals in Glenn cited with approval both United States v. Napoli and United States v. Beall.

implicate, much less violate, the Fourth Amendment. See Shackleford, 32 Va. App. at 324, 528 S.E.2d at 132; Hughes v. Commonwealth, 31 Va. App. 447, 454, 524 S.E.2d 155, 159 (2000).

Under the inevitable discovery doctrine, "if the government can prove that the evidence [obtained by illegal means] would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury." Timbers v. Commonwealth, 28 Va. App. 187, 199-200, 503 S.E.2d 233, 239 (1998) (quoting Nix v. Williams , 467 U.S. 43 1, 447 (1984)). This doctrine requires that the Commonwealth show (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct; (2) that the leads making the discovery inevitable were possessed by the police at the time of the misconduct, and (3) that the police also prior to the misconduct were actively pursuing the alternative line of investigation.

Timbers, 28 Va. App. at 199-200, 503 S.E.2d at 239 (quoting Walls v. Commonwealth., 2 Va. App. 639, 656, 347 S.E.2d 175, 185 (1986) & United States v. Cherry, 759 F.2d119(-), 1204 (5th Cir. 1985)); see also White v. Commonwealth, 9 24 Va. App. 234, 241, 481 S.E.2d 486, 489, affd en banc, 25 Va. App. 662, 492 S.E.2d 451 (1997).

The evidence satisfies the first two criteria for the inevitable discovery doctrine. First, Detective DeFreitas and the defendant would have found the cocaine in the El Camino with or without the Bridge Road search warrant. They arrived only moments after Detective Wright recovered the evidence pursuant to the search warrant. Second, the main leads "making the discovery inevitable" were the defendant

being taken into police custody at the time of his arrest - which occurred at 9:45 a.m. on June 18 - and his initial willingness to cooperate with the investigation.

The Commonwealth has also carried its burden can the third criterion. Detective DeFreitas was "actively pursuing the alternative line of investigation" by beginning the interrogation of the defendant at his home shortly after his arrest. This interrogation involved a "continuous" dialogue with the defendant from the morning until about noon when the defendant asked to speak to an attorney. Hearing Transcript at 64. At 2:00 P.M. that same dialogue, between the same two people, picked up where it left off when the defendant said he wanted to "cooperate" without an attorney and to tell DeFreitas "where the drugs were." Id. at 65.

This alternative line of investigation, therefore, began hours before the issuance of the allegedly defective search warrant at 1:30 p.m. Cf. Warlick v. Commonwealth, 215 Va. 263, 267, 208 S.E.2d 746, 749 (1974) (defendant voluntarily decided, independent of the allegedly unlawful police procedures, to "lead the police to the cache of drugs"), with Nix, 467 U.S. at 444 (rationale of the independent source exception is wholly consistent" with inevitable discovery doctrine). For these reasons, the inevitable discovery doctrine applies - rendering moot any objection to the legality of the Bridge Road search warrant.

IV.

In sum, the Court denies the defendant's motion to suppress his in-custody statements to Detective DeFreitas. No violation of Miranda has occurred here. The Court also declines the defendant's invitation to apply the exclusionary rule to the incriminating evidence found by police in his van

and his El Camino. The recovery of these items did not violate the defendant's Fourth Amendment rights. The search warrants issued by the magistrate satisfied the probable cause standard and adequately identified the places to be searched. Moreover, the inevitable discovery doctrine further protects the search of the defendant's El Camino from legal challenge.

It is so ORDERED.

Entered: August 10, 2000

/s/ D. Arthur Kelsey, Judge

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[Names And Address Omitted In Printing]

August 3, 2000

Honorable D. Arthur Kelsey, Judge
Circuit Court of the City of Suffolk
150 North Main Street
Third Floor
Suffolk, Virginia 23434

Re: Commonwealth of Virginia v. Eugene Wilkins

Dear Judge Kelsey,

This letter will serve as my response to the letter memorandum filed by Mr. Broccoletti dated July 20, 2000. I will address my response in the order of the issues as Set forth in Mr. Broccoletti's memorandum.

. Detective DeFreitas's advisement of rights was sufficient to apprise Mr. Wilkins of his rights under *Miranda v. Arizona and* its progeny

Detective DeFreitas testified that he advised Mr. Wilkins of his ***Miranda*** rights and that Mr. Wilkins stated he understood them. (T-63) Mr. Wilkins was asked if he wished to speak to the Detective without his attorney present which Mr. Wilkins agreed to. Later on, Mr. Wilkins indicated that he wished to have the services of an attorney and Detective DeFreitas

informed Mr. Wilkins that he could not speak to him any further. (T-64) At abouth 2:30 P.M., Mr. Wilkins told Detective DeFreitas that he would like to Speak with him in another area of the house. (T-65). It was at this time Mr. Wilkins agreed to take Detective DeFreitas and other officers to the location where the drugs were stored.

The case of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602f, 16 L. Ed. 2d 694 (1966), is the first case which dealt with the requirement that the police advise an arrestee or certain rights prior to a custodial *interrogation.* Certainly, at its inception, Mr. Wilkins was interrogated by Detective DeFreitas. However, Mr. Wilkins asked for an attorney at about 12:00 Noon. At that time, all questioning ceased until approximately 2:30 P.M. It was at that time Mr. Wilkins volunteered to speak with Detective DeFreitas. Mr. Wilkins initiated the chain of events at 2:30 P.M. As stated in ***Miranda***, "In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. *Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence.* The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a *person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.*" 384 U.S. at 478, 86 S. Ct. at 1630, 16 L. Ed. 2d at 726.

There is no evidence that the police in any fashion attempted to get Mr. Wilkins to speak with them. It is very

likely that Mr. Wilkins' wife may have had something to do with Mr. Wilkins's change of mind, but there is no evidence that Mrs. Wilkins was working on behalf of the police in her pleadings to Mr. Wilkins to cooperate with the police. While there is not a complete recitation of the Miranda rights before this Court, it is clear from the evidence that Mr. Wilkins had at a minimum of his right to counsel, which the police honored until Mr. Wilkins' volunteered statements to the police.

A similar rationale was put forward in the case of ***Massie v. Commonwealth,*** 211 Va. 429, 177 S.E. 2d 615, (1970). As the Virginia Supreme Court stated, "There is nothing in the record to show, or even to suggest, that the confession by Massie was provoked, coerced or encouraged, or was in any way the result of any promises made to him by the police officers. It came freely and voluntarily. Foster was under no duty to stop Massie from making a statement, to refuse him the conference that Massie sought ,Or to deny him the right to confess his involvement in crimes committed in "Amherst ,County"'. 429 Va. 615 at 432.

There was sufficient evidence to establish probable cause for the search warrant at 3943 Bridge Road, Suffolk, Virginia.

The affidavit for the search warrant of 3943 Bridge Road was built upon the previous affidavits for the search warrants for Waterview Drive and Brookwood Drive. However, there were certain critical information in those affidavits which were incorporated into the Bridge Road affidavit.

On page 8 of the affidavit there was the sentence "Wilkins stopped at 3943 Bridge Rd. exited the van and was observed going towards the side door". That at the beginning

of every morning ""Gene" delivers a quantity of crack cocaine to "'C.W." at 6117 Brookwood Drive. In the affidavit the police through surveillance followed the brown van belonging to Mr. Wilkins to the Brookwood Drive address, at which time an informant would be given United States currency in order to make a controlled purchase of cocaine.

On June 17, 1999, the informant went to the Brookwood Drive address to purchase cocaine. At that time the informant was told by "C.W."' that he did not have any but that "Gene" was going to bring him some cocaine. Police surveillance of Mr. Wilkins observed him leaving his residence and proceed down Route 17. On his way to the Brookwood Drive address, Mr. Wilkins stopped at the address of 3943 Bridge Road and went towards the side door carrying a white bag. The informant was sent back to the Brookwood Drive address and was informed that Mr. Wilkins and "C.W." had just got through cutting up a quantity of cocaine. The informant made a purchase of cocaine at that time.

Within the previous 72 hours prior to June 17, 1999, Mr. Wikins was inside the 6117 Brookwood Drive. At that time the informant observed Mr. Wilkins removing a large piece of cocaine from a white bag.

The next day, Mr. Wilkins was arrested at 9:45 A.M., and found to be in possession of a quantity of cocaine.

This Court must make the determination whether or not there was probable cause for the search warrant for 3943 Bridge Road. In making this determination the court must, as the very name implies, deal with probabilities. These are not technical; they are the factual and practical considerations in every day life on which reasonable and prudent men, not legal technicians, act. Probable cause exists when the facts and

circumstances within the officer's knowledge and of which he has reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense had been or is being committed. ***Saunders v. Commonwealth***, 218 Va. 294, 300, 237 S.E.2d 150, 155 (1977). In determining whether the affidavits are sufficient to support the search warrant, we must look to the totality of the circumstances. ***Illinois v. Gates***, 462 U.S. 213, 230 -31 (1983). The Supreme Court, rejecting a hypertechnical, rigid, and legalistic analysis of probable cause determinations, approved a common sense approach:

> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for ... concluding ' that probable cause existed. 462 U.S. at 238-39, (quoting ***Jones v. United States***, 362 U.S. 257/ 271 (1960)) (ellipses in original).

Additionally, the Supreme Court cautioned that an after-the-fact review of a magistrate's decision should not be made *de novo* and that great deference should be given to the magistrate's finding of probable cause. ***Gates,*** 462 U.S. at 236. The Supreme Court observed, '" [a] grudging or negative attitude by reviewing courts toward warrants,' . . . is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; 'courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner.'" *Id.* at 236, (quoting ***United States v. Ventresca,*** 380 U.S. 102, 108 - 09 (1965)). ***Derr v. Commonwealth,*** 242 Va. 413, 421-422,

410 S.E.2d 662,___ (1991)

Using the above as a guide let"s examine the affidavit in question. It is obvious from reading the affidavit the police had conducted a lengthy and detailed investigation of Mr. Wilkins and "C.W." Of significance was the police through surveillance and informants was able to learn of how the drug selling operation worked.

It, was clear that Mr. Wilkins would bring drugs to 6117 Brookwood Drive where they would be sold. On June 17, 1999, as part of the investigation which was set forth in the affidavit, Mr. Wilkins in the course of making a delivery to the Brookwood Drive address made a stop at 3943 Bridge Road carrying a white bag. Previously, Mr. Wilkins was observed by an informant at 6117 Brookwood Drive producing cocaine from a white bag.

As stated, we are dealing with probabilities here. Would a reasonable and prudent man, not a legal technician, have reason to believe that Mr. Wilkins would pick up drugs on the way to a location where there is ample information that Mr. Wilkins and his associate were selling drugs from? The answer is yes. All the credible information gathered by the police showed that Mr. Wilkins was the delivery person for the cocaine. When you couple this with the fact Mr. Wilkins was carrying a white bag which had been seen previously carrying cocaine, that probability is only strengthened. There is a strong nexus between the 3943 Bridge Road residence and the criminal activity being engaged in by Mr. Wilkins and "'C.W.".

In the event the Court finds that the affidavit did not set forth sufficient probable cause, the Court should uphold the warrant under the good faith exception to the exclusionary rule.

The good faith exeception to the exclusionary rule in ***United States v. Leon,*** ,169 U. S. 987 (1984) the Supreme Court stated the following test which we must apply to determine whether suppression of evidence is an appropriate remedy:

"Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.... The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role.... [I]n such circumstances, no reasonably well trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable..... Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient - i.e., in failing to particularize the place to be searched or the things to be seized - that the executing officers cannot reasonably presume it to be valid." ***Leon,*** 468 U.S. at 923 (citations omitted). ***Polston v. Commonwealth,*** 255 Va. 500, 503-504, 498 S. E. 2d 924, ___ (1998)

Using thc test in Leon, let us examine the facts in the present case. There is no evidence before this Court that Detective Chappell supplied either false information or recklessly disregarded the truth. There is no evidence that the magistrate abandoned his neutral and detached role here as reflected by the length and detail of the affidavit. Next, this was not a "bare bones" affidavit. The police had conducted a lengthy and comprehensive investigation. The affidavit is very lengthy and detailed and includes information gleaned from informants but extensive police investigation as well. It cannot

be said that this affidavit was so lacking in indicia of probable cause to render Detective Chappel's belief in its existence unreasonable. Last, it is not so facially deficient that Detective Chappel or any other police officer would not presume it to be valid.

Applying the ***Leon*** test, there is ample legal justification to apply the good faith exception to the exclusionary rule in the present case.

The El Camino automobile was not illegally searched pursuant to the warrant for 3943 Bridge Road.

There can be no question that a search warrant authorizing the search of the premises to include the curtilage would include vehicles found on the premises. The defendant cites several cases supporting the proposition that the search of the vehicles is reasonable. We agree that with a valid search warrant, a vehicle can be searched if belonged to the occupant *or the warrant specifically mentioned the area* to be, searched. The **Glenn** case cited by the defendant, did revolve around the defendant living for some periods of time at the premises.

There are cases which have held that the vehicles of mere visitors to a premises would be subject to search by the police pursuant to a warrant for the premises the visitor's vehicle is located. See ***United States v. Cole,*** 629 F.2d 897 (5th Cir. 1980) and ***Beeler v. State,*** 677 P.2d 653 (Okl.Crim.App. 1984)

The search of the vehicle pursuant to the search warrant can be sustained on another theory. A visitor's personal belongings may be searched where the police have grounds to believe that the belongings, here a vehicle, could be utilized as a hiding place. 2 W. LaFave, Search and Seizure § 4.10 (b).

The police could reasonably believe the cocaine and other items listed in section 3 of the affidavit could be located in the vehicle. See also ***United States v. Johnson,*** 475 F.2d 977 (D.C. Cir. 1973)

The Commonwealth contends that the evidence should be admitted under the inevitable discovery exception to the exclusionary rule.

The Commonwealth contends that the evidence from the El Camino would be admissible under the inevitable discovery doctrine. Inevitable discovery is been held valid in ***Nix v. Williams,*** 467 U.S. 431 (1984). There, the Court held that evidence may be admitted under this theory if the prosecution can establish by a preponderance of the evidence that it would ultimately or inevitably have been discovered. Id. at 444.

A question that remains unanswered from these cases, however, is what must be shown in order to establish that discovery of evidence is inevitable. In ***United States v. Cherry,*** 759 F.2d 1196 (5th Cir. 1985), the court considered this question and held that application of the inevitable discovery exception requires that the prosecution show:

> (l) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct, (2) that the leads making the discovery inevitable were possessed by the police at the time of the misconduct, and (3) that the police also prior to the misconduct were actively pursuing the alternative line of investigation. 759 F.2d at 1204 (citing ***United States v. Brookins,*** 614 F.2d 1037, 1042 n.2 (5th Cir. 1980)).

Regarding the need for the third requirement listed above, the court noted that "when the police have not been in

active pursuit of an alternate line of investigation ... the general application of the inevitable discovery exception would greatly encourage the police to engage in illegal conduct because (1) the police would usually be less certain that the discovery of the evidence is 'inevitable' in the absence of the illegal conduct and (2) the danger that the evidence illegally obtained may be inadmissible would be reduced." 759 F.2d at 1204-05. See also ***Walls v. Commonwealth,*** 2 Va. App. 639, 655-656, 347 S.E.2d 175, ___(1986)

What is important to note here is that the police were pursuing two independent lines of investigation that would have led to the recovery of the cocaine in the El Camino. Detective DeFreitas had obtained the Mr. Wilkins' cooperation in taking the police to where the drugs were being stored. At the same time Detective Chappel at 2:20 P.M. had obtained the search warrant for 3943 Bridge Road. The testimony was by both DeFreitas and Chappell that neither was aware of the other's actions. Therefore, we have two independent and alternative lines of investigation occurring in this case. Either line of investigation would have led to the discovery of the cocaine in the El Camino.

So if the Court suppresses the statements of Mr. Wilkins to Detective DeFreitas, the cocaine would have been discovered by lawful means to wit: the search warrant. Conversely, if the Court disallows the seizure of the evidence pursuant to the search warrant but allow the statements of Mr. Wilkins in, then the cocaine would have been discovered by lawful means as well.

Therefore, the Commonwealth believes that it should have the benefit of the inevitable discovery rule.

Conclusion

In conclusion, the Commonwealth has met its burden showing that the statements were volunteered by Mr. Wilkins to Detective DeFreitas and the cocaine seized should be admitted. Further, the Commonwealth has shown that the search warrant for 3943 Bridge Road was supported by probable cause. Even if the Court deems the probable cause insufficient, the Commonwealth is entitled to the benefit of the good faith exception to the exclusionary rule. Finally, the Commonwealth has shown that the cocaine seized from the El Camino would be admitted under the inevitable discovery exception to the exclusionary rule.

We respectfully ask that the Court overrule the motion to suppress.

Yours very truly,
/s/ W. Randolph Carter, Jr.
W. Randolph Carter, Jr.
Chief Assistant Commonwealth's Attorney

Certificate of Service

I hereby certify that the original of the foregoing was hand delivered to the Judge's Chambers of the Circuit Court of the City of Suffolk, 150 North Main Street, Third Floor, Suffolk, Virginia 23434 and a copy mailed to James O. Broccoletti, Counsel for the Defendant, Zoby and Broccoletti, 6663 Stoney Point South, Norfolk, Virginia 23502 this 3rd day of August, 2000.

/s/ W. Randolph Carter

ZOBY & BROCCOLETTI
(LOGO)
[Names And Address Omitted In Printing]

July 20, 2000

Honorable D. Arthur Kelsey
Judge, Suffolk Circuit Court
Godwin Courts Building
150 North Main Street
Suffolk, Virginia 23434

Re: Commonwealth v. Eugene Wilkins

Dear Judge Kelsey:

Please accept this letter memorandum as our position on the issues addressed at the Suppression Hearing.

I. **Detective Defreitas' statement "I mirandized him" does not constitutes sufficient Miranda warning.**

When Detective Defreitas "mirandized" Mr. Wilkins, he knew that Mr. Wilkins was not sure if he had previously received Miranda warnings or not. Therefore, before questioning W. Wilkins, Detective Defreitas was forced to properly give warnings to Mr. Wilkins in accordance with *Miranda v. Arizona*, 3 84 U. S. 43 6 (1966).

According to the oral testimony by Detective Defreitas, all that was stated by the Detective was that he "mirandized him." He also stated that it was done verbally, not by writing, and it was done from his memory.

We agree with *United States v. Frankson*, 83 F3d 79 (4th Cir. 1996) in that all police officers need to do is "convey the general rights enumerated in *Miranda.*" In *Frankson*, there was testimony that the rights he received were as follows:

> "Now I want to advise you of your fights. First of all, you have the right to remain silent. Anything you say, do, or write can and will be used against you. You have the right to an attorney. If you can't afford an attorney, the Government will get one for you. I also explained to him he could answer some of my questions, all of my questions, or none of my questions. I also told him that while he was talking to me, he was free to stop talking to me at any time. I asked him if he understood that. He indicated that he did by answering yes."

This reading was held to be sufficient in alerting *Frankson* of his *Miranda* rights.

However, with regard to the present case, it is unclear from the testimony of Detective Defreitas what, if any, rights were explained to Mr. Wilkins or if Mr. Wilkins understood them.

It has also been held that although no "talismanic incantations" of the *Miranda* warning is necessary, *California v. Prysock*, 453 U.S. 355 (1981), it is recognized that there is a "critical importance of the right to know that counsel may be present during questioning." *United States v. Noti*, 731 F2d 610 (9hCir. 1984)

In *United States v. Bland*, 908 F2d 471 (9th Cir. 1990), *Bland* was told that he had a right to an attorney prior to

questioning, and if he could not afford one, that an attorney would be appointed for him. The warning, however, failed to mention that *Bland* was entitled to have an attorney during questioning. *Bland's* statements were held to be inadmissable because the warning given was inadequate.

Once again, there is no testimony in the present case that this right or any other rights were mentioned.

In *Shell v. Commonwealth*, 11 Va. App. 247 (1990), it was held that the Commonwealth bears the burden of proving the defendant voluntarily made a knowing and intelligent waiver of his constitutional privilege against self-incrimination and his right to counsel.

Clearly the Commonwealth did not overcome its burden of showing that the Mr. Wilkins waived any rights, since no rights were revealed by the detective. Therefore, any and all statements given to the police and any evidence recovered that was discovered through statements from Mr. Wilkins, should be suppressed due to the failure of his receiving sufficient *Miranda* warnings.

H. There is not sufficient evidence to establish probable cause for a search warrant at 3943 Bridge Road.

The Fourth Amendment provides that "a search warrant shall issue only upon a showing of probable cause supported by oath or affirmation." The Virginia Code § 19.2-54 (1950 as amended) states that affidavits for search warrants must allege "... briefly material facts, constituting the probable cause for the issuance of such warrant ..."

Clearly in the affidavit set out for the search warrant of 3943 Bridge Road there are no material facts that could lead to probable cause that any crimes were being committed at that residence. The affidavit is actually a duplicate of affidavits that were submitted for search warrants, at different residences, the

day before. Those affidavits mention drug transactions that have been taking place between two co-defendant's houses. They were based on information received through reliable confidential informants and police surveillance.

The only time Bridge Road is mentioned in the eight (8) page affidavit is on page six (6) where it is stated:

> "Wilkins stopped at 3943 Bridge Rd. exited the van and was observed going towards the side door."

Honorable D. Arthur Kelsey
July 20, 2000
Page Three

It is clear that this statement in no way shows there is any probable cause or states any material facts with which to issue a search warrant on this address.

Although there is a good faith exception to the exclusionary rule, it does not apply to Mr. Wilkins' case. In *United States v. Leon*, 468 U.S. 897 (1984), the court held that the police could rely on a defective warrant in some situations. However, (1) if the judge or magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth, or if the magistrate was not wholly detached and neutral, or (2) if the police rely on a warrant lacking "in indicia" of probable cause as to render official belief in its existence entirely unreasonable, or (3) if the warrant is so facially deficient that the police cannot reasonably presume it to be valid, then the good faith exception does not apply. *See Leon* and *Robinson v. Commonwealth*, 19 Va. App. 642, 647 (1995).

There is an argument to be made whether or not the magistrate in the present case was "wholly detached and neutral"considering the amount of information given to him regarding the Bridge Road address ((1) above). We can also

argue that there was no way the police could have reasonably presumed it valid ((3) above). However, it is clear that there was no "indicia" of probable cause in the affidavit to render it reasonable and therefore the warrant was invalid and the good faith exception does not apply.

Expanding on what is "probable cause" we look to *United States v. Hove,* 848 F2d 137 (9h Cir. 1998). This case holds that facts set forth in an affidavit must establish a nexus between the place to be searched and the alleged criminal activity and that the *Leon* exception does not extend "to allow the consideration of facts known only to an officer and not presented to a magistrate. The *Leon* test for good faith reliance is clearly an objective one and it is based solely on facts presented to the magistrate." Id at 140

There is no evidence that the Bridge Road house was used as a "stash house," or that drugs were sold there, or that Mr. Wilkins lived there, or that any kind of illegality at all took place there. There is obviously no nexus between criminal activity and the fact that one time Mr. Wilkins stopped by his mother's residence on Bridge Road. Therefore the search warrant should be held to be improper and the subsequent search of the El Camino to be against Mr. Wilkins' Fourth Amendment right and against § 19.2-54 of the Code of Virginia.

III. The El Camino was illegally searched at the Bridge Road address.

There is an extraordinary amount of case-law regarding automobiles found within the curtilage of dwellings that are searched. In *United States v. Bulgatz,* 693 F2d 728 (8h Cir. 1982), the court held that it was proper to search a parked car in an attached garage, even though it wasn't specifically stated in the search warrant. However, the car was inside the building and was owned by the occupants. In *UnitedStates v. Napoli,* 530 F2d 11 98 (5h Cir. 1976), a camper in the driveway was

found to have been properly searched, but that was because the search warrant stated things "on

the premises" were subject to the search. Finally, in *United States v. Beall*, 767 F2d 913 (4th Cir. 1985), the court upheld the search of a truck parked in an auto body shop, when the warrant was just for the auto body shop. All of these searches were found to be reasonable and we agree. Assuming the warrants were based on probable cause, they either specifically mentioned the area to be searched or they included curtilage that belonged to the ones being searched

However, there is only one case that is close to controlling the present case, that is *Glenn v. Commonwealth, 10* Va. App. 150 (1990). In *Glenn,* the Court stated that, "the great weight of authority supports the proposition that a search warrant authorizing the search of a dwelling covers the occupant's automobiles found within the curtilage of those premises, even where the vehicle is not named in the warrant." *Glenn* at 508 (emphasis added).

Glenn's automobile was searched while there was a search of his mother's house being conducted. *Glenn* argued that since the vehicle did not belong to the owner of the house, then it should not be considered part of the curtilage. The Court held that even though *Glenn* didn't own the residence, there was evidence that *Glenn* resided there and that is what is controlling in determining if the automobile was part of the curtilage. Therefore the car was subject to search.

In the present case, there is no evidence that Mr. Wilkins owns the property at 3943 Bridge Road, moreover there is no evidence that he resides at this address. Since Mr. Wilkins is not an "occupant" of the house being searched, then his

automobile is not part of the curtilage. Therefore it is clear that the search of his El Camino was illegal. Evidence obtained from the search should be held inadmissable as being fruit of an illegal search and a failure to suppress it would be a violation of Mr. Wilkins' rights under the Fourth Amendment to the United States Constitution.

IV. The search of the El Camino is not admissible under the doctrine of "inevitable discovery."

For the doctrine of inevitable discovery to be appropriate, the Commonwealth must establish, by a preponderance of the evidence, that illegally obtained evidence would have ultimately or inevitably been discovered. *Nix v. Williams,* 467 U. S. 431 (1984). In *Walls v. Commonwealth,* 2 Va. App. (')3 9 (1986), the Court adopted the test set out in *United States v. Brookins,* 614 F2d 103 7 (5h Cir. 1980). This test requires the prosecution to show:

(1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct, (2) that the leads making the discovery inevitable were possessed by the police at the time of the misconduct, and (3) that the police also prior to the misconduct were actively pursuing the alternative line of investigation.

In Tinibers v. Commonwealth, 28 Va. App. 187 (1998), the court held that the Commonwealth could not rely on the "inevitable discovery" doctrine because it failed to prove the *Walls* factors. Most importantly the Commonwealth did not effectively prove that it was pursuing

alternative lines of investigation and even if it was pursuing other lines, the Commonwealth did not show that those lines would have led to any evidence.

Also, in *Commonwealth v. Ealy*, 12 Va. App. 744 (1991) the Commonwealth could not rely on "inevitable discovery" because it failed to produce any evidence that the police would have eventually had justification for the searching of a garage, that was illegally searched..

In the present case, the Commonwealth has not proved by a preponderance of the evidence even one of the three parts of the *Walls* test. Detective Armstrong stated that while Mr. Wilkins was under surveillance, he was never seen driving any car, other that a brown dodge van. Therefore, there is no probable cause that the El Camino was involved in anything illegal and hence the first part of the test has not been fulfilled.

In accordance with the second part of the test, there was no testimony regarding the police having any leads that the El Camino or 3943 Bridge Road was involved in any impropriety. The affidavits for the search warrants may be reviewed, in order to determine what the police knew at the time of the misconduct, and from a reading of them it is clear that the police never suspected or even mentioned an El Camino in their reports and only mentioned Bridge Road once in eight pages.

The Commonwealth provided no evidence that the police were actively pursuing any alternative lines of investigation regarding the El Camino at the time of the discovery of any evidence. The Commonwealth may claim that they were pursuing other lines by questioning Mr. Wilkins or by obtaining a search warrant on Bridge Road, however; (1) Mr. Wilkins never received proper Miranda warnings and therefore any evidence received by the police would have to be suppressed, including information regarding the El Camino, and (2) the police had already searched the car illegally because they

did not have a proper search warrant. Therefore, if there were any other lines of investigation, they were illegal at best.

It is clear that the Commonwealth has not upheld its burden to convince the court that all three parts of the test have been met. The evidence illegally seized from the El Camino would not have inevitably been discovered and the taint has not been overcome, consequently the evidence must be suppressed.

Conclusion

The Commonwealth has not upheld its burden in proving that Mr. Wilkins was properly given his Miranda warnings. Therefore any statements given by him to the police should be suppressed and any evidence seized due to his statement should also be suppressed.

There has been no evidence that there was probable cause to have a search warrant issued on 3943 Bridge Road. Further, there is no evidence that the good faith exception should apply. Therefore, any evidence obtained at the residence must be suppressed and any evidence obtained from the El Camino must be suppressed.

It is also clear that the police had no right to search the El Camino anyway, since it was not owned[by an occupant of the house on which the warrant was being served.

Finally, the Commonwealth has not proven that the police would have found the evidence through inevitable discovery using the three prong test set out in *Walls v. Commonwealth.*

We would ask that Your Honor suppress any and all

evidence that was illegally obtained in this matter.

Respectfully,

ZOBY & BROCCOLETTI, P.C.

/s/ James O. Broccoletti

JOB/jpn
cc. Eugene Wilkins

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum was mailed to W. Randolph Carter, Office of the Commonwealth's Attorney, 441 Market Street, Suffolk, Virginia, 23434, this 20th day of July, 2000.

/s/ James O. Broccoletti

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF SUFFOLK

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v. DOCKET NO.: CR00F00016-17

EUGENE WILKINS,

Defendant.

RESPONSE TO BILL OF PARTICULARS

COMES NOW the Defendant, by counsel, and in response to the request for a Bill Of Particulars states as follows:

1. That the stop of the Defendant's vehicle and subsequent search of his person was not supported by any reasonable suspicion and/or probable cause and was accomplished without the consent of the Defendant;

2. That the rights afforded the Defendant during the traffic stop on June 18, 1999 were tainted by the illegal detention and seizure of the Defendant;

3. That the search of 6117 Brookwood Road was unconstitutional as it was based upon a faulty affidavit which contained information that was illegally obtained;

4. That the search of the El Camino vehicle at the Bridge Road address was supported by an improper search warrant;

5. That the Miranda warnings given the Defendant at the 100 Waterview address were incomplete and not accompanied by a valid waiver so as to render them ineffectual and any subsequent statement inadmissable; and,

6 That the Defendant requested an attorney and did not reinitiate any further conversation with the officers.

EUGENE WILKINS

By: /s/ James O. Broccoletti

Of Counsel

James O. Broccoletti, p.d. (VSB#17869)
Zoby & Broccoletti, P.C.
6663 Stoney Point South
Norfolk, Virginia 23502
Tel.: (757) 466-0750

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response To Bill Of Particulars was mailed via regular U.S. mail to W. Randolph Carter, Jr., Chief Assistant Commonwealth's Attorney, Office of the Commonwealth's Attorney, City of Suffolk, 441 Market Street, Suffolk, Virginia 23434, this 19th day of April, 2000.

/s/ James O. Broccoletti

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF SUFFOLK

COMMONWEALTH OF VIRGINIA

V. CR00F00016-17

EUGENE WILKINS

MOTION FOR A BILL OF PARTICULARS

NOW COMES the Commonwealth of Virginia by its Chief Assistant Commonwealth's Attorney for the City of Suffolk, W. Randolph Carter, Jr., and moves this court to order the counsel for the defendant in the above captioned matter to file a bill of particulars regarding a motion to suppress filed by the defendant in the above captioned matter on January 7, 2000. This motion is based upon the fact that the motion as filed states with no particularity the actions by any law enforcement agency, and prevents the Commonwealth from adequately preparing for the motion to suppress. Attached the court will find a copy of the motion to suppress which has been filed in this matter and marked "Exhibit 1".

Further the Commonwealth would request that the bill of particulars be filed within SEVEN (7) days of the date scheduled for a hearing in this matter.

COMMONWEALTH OF VIRGINIA

By /s/ W. Randolph Carter, Jr.

Chief Assistant Commonwealth's

Attorney

CERTIFICATE

I hereby certify that the original of the foregoing was hand delivered to Henry C. Murden, Clerk, Circuit Court of the City of Suffolk and a copy mailed to James 0. Broccoletti, Zoby & Broccoletti, 6663 Stoney Point South, Norfolk, Virginia, 23502, Counsel for the Defendant, this day 7th of March, 2000.

/s/ W. Randolph Carter, Jr.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF SUFFOLK

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v. DOCKET NO.:

EUGENE WILKINS,

Defendant.

MOTION TO SUPPRESS

TO: W. Randolph Carter, Jr.,
Chief Assistant Commonwealth's Attorney
Office of the Commonwealth's Attorney,
City of Suffolk
441 Market Street
Suffolk, Virginia 23434

COMES NOW the Defendant, by counsel, and moves this Honorable Court for entry of an order suppressing from evidence all alleged tangible evidence seized or statements taken from the Defendant, including all alleged contraband, on the basis of the illegal arrest, search and seizure of the Defendant; the involuntariness of any statement; the absence of a knowing waiver of any Miranda rights.

EUGENE WILKINS

By: /s/ James O. Broccoletti

Of Counsel

James O. Broccoletti, p.d. (VSB#17869)
Zoby & Broccoletti, P.C.
6663 Stoney Point South
Norfolk, Virginia 23502
Tel.: (757) 466-0750

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion to Suppress was mailed via regular U.S. mail to W. Randolph Carter, Jr., Chief Assistant Commonwealth's Attorney, Office of the Commonwealth's Attorney, City of Suffolk, 441 Market Street, Suffolk, Virginia 23434, this day of 6th day of January, 2000.

/s/ James O. Broccoletti